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No.

IN THE

Supreme Court of the United States

October Term, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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APPENDIX A

Opinion of the Court of Appeals Sur Petition for Rehearing and Statement of Adams, J., Sur Denial of the Petition for Rehearing In Banc

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1047 and 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees of Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,

Appellants and Cross-Appellees

v.

KAISER ALUMINUM & CHEMICAL CORPORATION, KAISER ALUMINUM & CHEMICAL SALES, INC., ROBERT A. KENNEDY and KENNEDY CULVERT & SUPPLY COMPANY and ROBERT KENNEDY

Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc.,

Appellees and Cross-Appellants

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D. C. No. 74-0122)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and ROSENN, *Circuit Judges*.

The petition for rehearing filed by appellees and cross-appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

/s/ Seitz

Circuit Judge

DATED: March 8, 1985

Judge Becker would grant rehearing limited to the price-squeeze issue.

STATEMENT OF ADAMS, J., SUR DENIAL OF THE PETITION FOR REHEARING IN BANC

I respectfully dissent from the order denying rehearing in banc, because I believe that this case raises a number of issues of sufficient import to command the attention of the entire Court.

First, I believe there is a serious question whether Kaiser's contentions regarding the applicability of the Supreme Court's recent decision in *Copperweld Corp. v. Independent Tube Co.*, 104 S.Ct. 2731 (1984), have been properly answered. *Copperweld*, handed down after the trial but before the decision of the panel, holds that a parent and a wholly-owned subsidiary are not considered separate entities for purposes of a conspiracy charge under section 1 of the Sherman Act, 15 U.S.C. §1. If there can be no intra-enterprise conspiracy under section 1 of the Sherman Act, Kaiser asserts that logic dictates a similar result under section 2 of the Sherman Act. If Kaiser is correct, then the propriety of the jury's verdict which relied in part on such a conspiracy is called into question.

Second, the bifurcation of the trial resulting in different juries determining liability and damages raises serious questions under the standard set forth by the Supreme Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 495 (1931). This Court has recently recognized the continued vitality of *Gasoline Products* — that retrial of only one issue in a case, such as liability, is not proper unless "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. In *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576 (3d Cir. 1983), the Court emphasized the danger of separate trials on damages and liability, particularly when there is evidence, as here, that the first jury reached a compromise verdict. This is illustrated by the fact that the first jury returned a damage verdict of $5,445,000 when tre-

bled and the second jury returned a verdict of $9,567,939 when trebled.

Finally, the substantial expansion of the "price squeeze" theory of liability also merits attention. Kaiser has been found guilty of utilizing an unlawful price squeeze even though during the years in question plaintiff was purchasing its raw materials from Alcoa and Reynolds, rather than from the defendant. One essential element of a price squeeze is monopoly power in the raw material. *See United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Therefore, it appears to be a significant extension of the price squeeze doctrine to predicate antitrust liability on such a basis in a case in which the defendant is not selling the raw material in question to the plaintiff and there is no evidence of any conspiracy between defendant and the other suppliers of the raw materials.

Each of these important issues would appear to warrant further attention by the entire Court.

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Clerk of the United States Court of Appeals
for the Third Circuit

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APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1047 and No. 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees of Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,

Appellants and Cross-Appellees

v.

KAISER ALUMINUM & CHEMICAL CORPORATION, KAISER ALUMINUM & CHEMICAL SALES, INC., ROBERT A. KENNEDY and KENNEDY CULVERT & SUPPLY COMPANY and ROBERT KENNEDY

Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc.,

Appellees and Cross-Appellants

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. No. 74-0122)

Argued: September 13, 1983

Before: SEITZ, GIBBONS and ROSENN,
Circuit Judges.

(Opinion Filed: December 27, 1984)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I.

The plaintiffs appeal from an order of the district court partially granting judgment notwithstanding the verdict which eliminated the largest element of the jury's damage award in an antitrust action. The defendants, Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc. (collectively "Kaiser") cross-appeal from a judgment entered after a special jury verdict finding them in violation of the antitrust laws. This court has jurisdiction under 28 U.S.C. §1291 (1983).

II. BACKGROUND

The plaintiffs were the sole stockholders of the now defunct Columbia Metal Culvert Co., Inc. ("Columbia") which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. They allege that Kaiser monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of sections one and two of the Sherman Act, 15 U.S.C. §§1 and 2 (1983).

Columbia began to manufacture aluminum drainage pipe in 1962. Originally, Columbia purchased all of its raw materials from Kaiser. The raw material for manufacturing pipe comes in two primary forms: corrugated aluminum sheet which is rolled and riveted into pipe, and aluminum coil which is formed into helical pipe by a spiraling machine. Initially, Columbia purchased only sheet, but in 1970, it acquired a spiraling machine, and thereafter produced mostly pipe formed from coil.

In 1972, Columbia and Kaiser had a falling out, after which Kaiser no longer sold coil to Columbia, which thereafter purchased its raw materials from Alcoa and Reynolds. In 1973, Columbia's best salesman, Robert Kennedy, left Columbia to become an independant distributor of Kaiser's aluminum pipe. At the same time, Kaiser opened a pipe fabrication plant only a few miles from Columbia's. In 1974, Kaiser along with the other major aluminum producers raised the prices of aluminum coil and sheet to roughly the same price that Kaiser charged for the finished pipe. Throughout this period, Kaiser produced approximately 80% of all the aluminum pipe used in Columbia's geographical marketing region.

The plaintiffs allege that as a result of Kaiser's conduct, Columbia began experiencing financial difficulties, and stopped producing pipe in 1975. Eventually, Columbia's assets were sold to a third party in 1978. In 1981, the third party sold the remaining assets of Columbia to Kaiser.

This action was first filed in January of 1974 under section four of the Clayton Act, which gives a private cause of action under the antitrust laws, alleging, inter alia, violations of sections one and two of the Sherman Act. At the first trial in 1977, the district court directed a verdict for Kaiser at the conclusion of plaintiff's evidence. This court reversed, holding that there was sufficient evidence to permit the case to go to the jury. *Columbia Metal Culvert Co., Inc. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). A second trial held in 1979 resulted in a jury verdict for the plaintiffs and an award of damages. The district court, however, granted in part the defendants' post-trial motion for a new trial by ordering a trial on damages only. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F.Supp. 102 (E.D. Pa. 1981). A limited retrial was conducted in 1981, resulting in a damage award of $9,567,939 after trebling. The district court then granted, in part, the defendant's motion for judgment notwithstanding the verdict, reducing the judgment to $4,651,560.

The plaintiffs appeal the reduction of the damage award, and the defendants cross-appeal the failure of the district court to grant a new trial or to grant in full their motion for a judgment notwithstanding the verdict. We turn first to the defendants' cross-appeal.

III. The Doctrine of Intra-Enterprise Conspiracy

The defendants contend that the jury verdict must be set aside and a new trial ordered because of the recent decision in *Copperweld Corp. v. Independence Tube Co.*, ___ U.S. ___, 104 S.Ct. 2731 (1984). In that case, the Supreme Court held that a parent corporation and its wholly owned subsidiary cannot be considered separate entities for purposes of section one of the Sherman Act. Thus, a parent corporation and its wholly owned subsidiary cannot by themselves violate that provision which

requires concerted action by at least two participants. Because the two entities in the section one claim in this case are the Kaiser Aluminum & Chemical Corporation ("KACC") and its wholly owned subsidiary Kaiser Aluminum & Chemical Sales, Inc. ("KACSI"), the defendants contend that the finding of liability must be set aside if the *Copperweld* rationale is applicable to this case.

This court had previously held that the plaintiff could proceed with a section one claim based on a conspiracy between the parent KACC and its subsidiary KACSI. 579 F.2d at 33-35. After oral argument was heard on this appeal, the Supreme Court granted the petition for certiorari in the *Copperweld* case. The parties were asked to submit supplemental briefing on the potential effect of *Copperweld*. After due consideration, we decided to defer resolution of this appeal until after the Supreme Court decided *Copperweld*.

Having now considered the decision of the Supreme Court, we believe that it is unnecessary to reach the issue of the applicability of *Copperweld* because the damage award may be sustained solely on the separate section two verdicts that do not depend on a theory of intra-enterprise conspiracy. Kaiser contends that when a verdict may rest on either of two claims, one supported by the evidence and the other not, a judgment thereon must be reversed. *See Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979). The case that Kaiser cites, *Simko*, rested on a general verdict in which it is impossible to determine if a jury found the defendant liable on both grounds or only one ground. In this case, special interrogatories were submitted to the jury on each of the theories of liability, and the jury determined that the defendants violated both section one and section two of the Sherman Act. Under these circumstances, we are not required to remand for a new trial solely because the section one claim may be invalid.

The defendants argue, however, that the causation of damages from the monopolization and attempt to monopolize verdicts are also tainted by the theory of intra-enterprise conspiracy. The jury returned separate verdicts against the defendants for monopolization, attempt to monopolize, and conspiracy to monopolize under section two. Although the conspiracy verdict, which depended upon an intra-enterprise conspiracy, was separately rendered, only a single interrogatory was asked as to causation of injury. The jury answered "yes" to the question: "[W]as any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of the plaintiff?"

The defendants contend that *Copperweld* must necessarily apply to a section two conspiracy to monopolize, and since the jury was not asked separate questions on proximate cause, it is impossible to determine if the jury found that the injuries were caused by an impermissible theory of liability. The defendants' contentions succeed only if it were possible that the jury could infer that some of the plaintiffs' injuries resulted solely from the conspiracy and not from the monopolization or attempt to monopolize. Assuming without deciding that *Copperweld* applies to a section two conspiracy, we conclude that it was not possible for a reasonable jury in this case to find that injury was caused by conduct pursuant to the conspiracy that was not also conduct in furtherance of the monopolization or the attempt to monopolize.

Specific intent is an element of a conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 154 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982). Because the jury was charged that it had to find that there was a specific intent to monopolize before returning a verdict on conspiracy to monopolize, the jury necessarily found that both the parent KACC and the subsidiary KACSI had the specific

intent to monopolize the aluminum pipe market. Thus any concerted activity undertaken in the conspiracy that could give rise to damages would have been undertaken with the purpose of monopolization. Because the conspiracy defendants are the same defendants in the monopolization and attempt to monopolize charges, any activity in the conspiracy, which must have had the purpose of monopolization, would necessarily be attributable to the same defendants as part of the monopolization or attempt to monopolize.

Furthermore, the defendants do not point to any evidence in the record that evinces actions in the conspiracy that could give rise to damages and that are not necessarily part of the attempt to monopolize or the monopolization. Thus, under the particular circumstances of this case, we conclude that the jury verdict and award of damages would be the same even if the jury had not been instructed that KACC and KACSI could be considered separate entities.

IV. The Monopolization Claim

A. The Effect of This Court's Decision in 1977

We next turn to Kaiser's contention that its motion for a judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support the claim of monopolization or attempt to monopolize. The plaintiffs argue that Kaiser may no longer raise this issue because this court had determined on the appeal from the first trial that there was sufficient evidence of monopolization to go to the jury. *Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

The evidence presented at the liability 1979 trial, however, differed in several material respects from the evidence presented at the first 1977 trial. In particular, the plaintiffs' evidence at the later 1979 trial significantly undercut the economic significance of the facts that the

parent KACC charged its subsidiary KACSI a price for aluminum sheet and coil that was well below the market price while at the same time KASCI was selling coil to independent pipe fabricators at the higher market price. Kaiser's pricing policies with respect to its subsidiaries and to independent fabricators were elements of our earlier decision. 579 F.2d at 31.

Because there were material differences in the evidence presented at the two trials, we believe that the question of the sufficiency of the evidence presented at the 1979 liability trial is still open for review. *See Johnson v. Bernard Ins. Agency, Inc.*, 532 F.2d 1382, 1384 (D.C. Cir. 1976).

B. Sufficiency of the Evidence of Monopolization

There are two main elements in monopolization: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966); *Borough of Landsdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982).

Kaiser's contentions on liability in this appeal go to the question of whether there is insufficient evidence that its alleged conduct demonstrates the willful acquisition or maintenance of monopoly power.[1]

In reviewing a record for sufficiency of the evidence, this court must expose the evidence to the light most favorable to the non-movant with the advantage of every fair and reasonable inference. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962);

1. In this appeal, Kaiser does not contest that the relevant product market is aluminum drainage pipe, or that the relevant geographic market is the Mid-Atlantic states. Nor do any of the issues raised by Kaiser in this appeal relate to whether it possessed monopoly power or whether that power was a consequence of a superior product, skill, or historical accident.

Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

1. *Kaiser Attempted to Control Its Competition.* There was evidence that Kaiser attempted to control the independent fabricators by requiring them to purchase all of their raw materials from Kaiser. Mr. Bonjorno of Columbia, and Mr. Arvay of U.S. Aluminum, a South Carolina fabricator, both testified that Kaiser attempted to coerce the fabricators into purchasing only from Kaiser. There was testimony that Holmes Collins, the Kaiser manager of the division that manufactured and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources. There were threats that if Kaiser saw so much as one pound of metal from another producer that it would terminate its relationship with Columbia. When Columbia did purchase aluminum from another company, Kaiser carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia. Finally, there was evidence that Holmes Collins told Columbia's owners that Kaiser would control Columbia's growth and market.

From this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe. The mere location of a plant, or the unilateral refusal to deal may not, by themselves, be antitrust violations. However, the combination of the threats as well as evidence that Kaiser's management had originally requested that the plant be located elsewhere is evidence from which a jury could legitimately infer that Kaiser attempted to control its competition, and failing that, tried to destroy it.[2] *Schine Theatres v. United States*, 334 U.S. 110, 119

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2. Further evidence of Kaiser's attempt to control or exclude competition lay in the veiled threats that Holmes Collins made to

(1948) (threat of opening theatres by a monopolist is evidence of intent) (*Copperweld, supra*, overruled the section one charge in *Schine*, but re-affirmed the section two charge).

2. *Kaiser's Actions to Destroy Columbia.* In addition to locating a plant near Columbia's, the plaintiffs allege that Kaiser engaged in a series of deliberate acts to drive Columbia out of the pipe market. The most serious claim is that Kaiser deliberately raised the price of the raw materials to the same level as the price that it charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe competitively with Kaiser. The plaintiffs term this price condition a "price squeeze."

The evidence and the record show that for a significant period of time in 1974, the distributor list price of Kaiser's aluminum pipe, per pound, was just above, or even below, the market price for aluminum coil. The mere existence, however, of a "price squeeze" is not necessarily an antitrust violation. The plaintiff must present evidence that the defendants deliberately produced the effect, sufficient to provide a reasonable basis for the jury to conclude that the "squeeze" was not the result of natural market forces such as supply and demand or legitimate competition. *Cf. California Computer Prods. Inc. v. IBM*, 613 F.2d 727, 735 (9th Cir. 1979).

To show that the price squeeze was a deliberate act on the part of Kaiser, the plaintiffs produced evidence that Kaiser controlled both the price of the raw material and the price of the finished pipe, and that Kaiser exercised that power. That Kaiser could control the price of the finished pipe is evident. By setting the price at which

NOTES *(Continued)*

Alcoa. Alcoa's manager testified that Collins stated that "if [Alcoa] thought that [it] could sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators, [Alcoa] had another thing coming, or some words to that effect." App. at 1085.

it sold to distributors, Kaiser effectively controlled the prices at which the distributors bid to contractors. Further, because of Kaiser's large market share, it was likely that it or one of its distributors would be bidding on nearly every job. In this fashion, Kaiser, if it desired, could keep the prices of the pipe low.

The plaintiffs' evidence of Kaiser's control over the prices of the raw material, aluminum coil, is more problematic. In part, it lies in understanding the nature of the market for aluminum coil and sheet used in fabricating pipe. Prior to 1974, Kaiser and some of the other aluminum producers maintained a separate price list, called a commodity price, for aluminum alloy sold to fabricators to manufacture pipe. The commodity price was usually lower than the general or specification price charged for the same alloy used for other purposes. It was never contended, however, that Kaiser lost money at the lower commodity price, and KACSI usually reported a profit from the sale of coil and sheet at the commodity price. App. at 4674-4824.

Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators, although if the aluminum used by its own pipe plants were included, it produced over 80% of the aluminum used for making pipe. Kaiser contends that since it was not the dominant force in the commodity price market for aluminum coil and sheet, it did not control the prices of the raw materials. The plaintiffs' theory, however, was that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy. Thus, Kaiser's prices would determine the market prices.

The principal evidence in support of this theory was the testimony of Professor Oliver Williamson, an economist and expert in antitrust. He testified that the aluminum industry was an oligopoly limited to a few major producers of aluminum, and that in particular lines of aluminum products, one of the producers became dom-

inant and set the pricing strategy for the rest of the industry. He indicated that the other aluminum producers usually followed the price leader because if an aluminum producer did not comply, it would not be followed in the areas where it was dominant. He further indicated that there were economic studies that tended to show that the price leadership phenomenon was especially noticable during the early to mid-1970's and that aluminum prices were kept high by the producers during the relevant period.

Further, Dr. Williamson testified that he believed that Kaiser was the dominant firm in setting the prices for aluminum coil and sheet used in making pipe. Dr. Williamson's opinion that Kaiser was the dominant firm in the aluminum pipe area was buttressed with evidence that showed that Kaiser was the largest producer of coil used for pipe, that it was the only major manufacturer who had an extensive marketing and engineering staff who actively promoted and studied the uses of aluminum pipe, and that Kaiser had the largest interest in pipe prices because it sold over 80% of the aluminum pipe in the country. If there were price leadership, it would be most likely that Kaiser set the pricing policies because of its extensive expertise and investment, rather than Reynolds or Alcoa who had so little involvement in the area.

That there was price leadership was supported by the testimony of Thomas Melrose, a manager at Alcoa, and Lonsdale Lawrence, an engineer from Reynolds. Melrose testified that Alcoa did not independently set prices but followed the prices that Kaiser and Reynolds set for the corrugated aluminum sheet used for making pipe. Lawrence testified that for corrugated sheet, Reynolds would follow Kaiser's announced prices each time the prices changed. Although Melrose's and Lawrence's testimony was in reference to corrugated sheet and not to coil, their testimony confirms Dr. Williamson's general observations on the existence of

price leadership in the aluminum drainage pipe raw material marker. Further, the evidence indicated that the prices for coil and sheet as raw materials for pipe did not differ in material respects.

Kaiser contends, however, that the plaintiffs' documentary evidence on the actual prices charged by the three major manufacturers failed to show price leadership. In particular, Kaiser points to evidence that on one occasion Alcoa raised the price of aluminum coil three days before the effective date of Kaiser's comparable price change as proof that Alcoa, and not Kaiser, was the price leader.

Dr. Williamson testified, however, that a pricing change did not have to be initiated by the price leader. Also, Alcoa's price change, although occurring three days before the effective date of Kaiser's change, may have been made after Kaiser announced its change either publicly or privately.

At most, Columbia's pricing evidence was susceptible of an inference inconsistent with price leadership. When contradictory inferences can be drawn from the evidence, the question should be resolved by the jury and it is not a matter for the consideration of the court on a motion for a JNOV. Given that Dr. Williamson's opinion was well supported by the evidence, we cannot say that the question of price leadership should not have gone to the jury.

The next question is whether the evidence shows that Kaiser deliberately manipulated the coil and pipe prices to create a squeeze. There was evidence that the squeeze was not caused by natural market forces.

The most significant evidence of deliberate manipulation of the coil prices was Kaiser's withdrawal of the commodity price for coil in January of 1974. This caused a steep rise in the price of coil from about 38 cents per pound to about 44 cents per pound. At approximately the same time, Alcoa and Reynolds raised their coil prices to the same price levels. Dr. Williamson testified that he

believed that the price hike was made for "stragetic" reasons. Even Kaiser's manager, Holmes Collins, testified that the commodity price was withdrawn because Kaiser no longer wished to sell to independent fabricators. Thus, Collins' testimony supported an inference that the price change was not related to costs but was intended to affect the independent competition.

Perhaps some of the strongest evidence that the price squeeze was deliberate lies in the relationship of the price of coil charged by Kaiser and its distributor price for pipe. If the coil prices charged by KACSI truly reflected the cost of the coil plus a fair return, then the price of the finished pipe should be higher by at least the fabrication cost of the pipe. However, the price of the pipe was often below the price of the coil during the first six months of 1974. Alternatively, if the price of the pipe reflected Kaiser's true costs plus a fair return, then the price of the raw material should be less by at least the cost of the fabrication. Thus, either the pipe prices were too low, or the raw material prices too high.

Further evidence that the price squeeze was deliberate lay in the transfer price system used by Kaiser. The transfer price is the price that the parent KACC charged its subsidiary KACSI for aluminum. The transfer price was a fixed price per pound that is set once a year and reflects the projected direct costs of producing the aluminum and excludes an allowance for corporate overhead. As such, the transfer price is usually well below the market price. Although the transfer price system itself is not evidence of classic predatory behavior, Kaiser's system permitted KACSI to set coil prices for its competitors without affecting its pipe costs. Usually, the market price of the raw materials determines the price of the finished product. In this case, Kaiser could set whatever market price it chose for the raw material, within certain limits, without directly affecting its market price for pipe.

Given these facts, there was sufficient evidence for the jury to conclude that Kaiser not only possessed the

power to create the price squeeze, but that it exercised that power to destroy its competition. *See United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).

There is additional evidence that Kaiser sought to destroy Columbia by setting up Robert Kennedy as a distributor. There is evidence that Kaiser extended credit to Kennedy even though its credit department concluded that Kennedy's operation was an "unacceptable credit risk." App at 4466. The jury could infer that by going against the very strong recommendation of its credit department, Kaiser displayed its intent to drive Columbia out of business. *See Columbia*, 574 F.2d at 31. *Cf. Greyhound Computer v. IBM*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (If a jury concludes that a manufacturer possesses monopoly power, then it would be precluded from otherwise lawful practices that exclude competition). Although Kaiser contends that the credit department did eventually approve of the Kennedy account, the evidence indicates that during the first year, Kaiser extended Kennedy up to at least $78,000 credit secured by no more than Kennedy's $25,000 letter of credit and by a security interest in the accounts receivable, which was not much more than the security earlier evaluated by the credit department as unacceptable. App. at 4466.

Further, contrary to Kaiser's contentions, we do not consider that Kennedy's dismissal as a defendant renders the evidence of Kennedy's activities irrelevent to the monopolization claims against Kaiser. The district court's instructions in this regard were fully consistent with this court's earlier opinion. *See Columbia*, 579 F.2d at 31, 36.

When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have

crossed the shadowy barrier of the Sherman Act. *See* Handler, Some Unresolved Problems of Antitrust, 62 Colum. L. Rev. 930, 934 (1962). Given the evidence of Kaiser's anticompetitive behavior, we hold that there was sufficient evidence to permit the monopolization claim to go to the jury.[3]

V. Contradicting Evidence Presented at the Liability and Damage Trials

Kaiser also contends that a judgment notwithstanding the verdict (JNOV) should have been granted because the plaintiff produced evidence at the trial on damages that contradicted the evidence presented at the liability trial. Kaiser, however, fails to explain the legal theory supporting its contention.

Normally, when the evidence is contradictory, a JNOV is inappropriate. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977). The assumption is that the jury should decide factual issues involving contradictory evidence. In this case, however, no single jury heard all of the allegedly contradictory testimony. Kaiser's argument must be that if a single jury had heard both the evidence on liability and damages, then that jury would not have returned a verdict against Kaiser. Under this theory, however, a JNOV is not the proper remedy in this case. There was sufficient evidence of monopolization to go to the jury, even if, as Kaiser contends, the plaintiff's introduced evidence that was inconsistent with their theory of liability.

The proper remedy, at best, would be a new trial on both liability and damages. Kaiser, however, does not ar-

3. Kaiser does not contend on this appeal that there was insufficient evidence as to any issues, such as specific intent to monopolize or a dangerous probability of achieving monopoly power, that relate solely to the attempt to monopolize claim. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975).

gue for a new trial on the ground that testimony inconsistent with the theory of liability was introduced at the damages trial.

Even if we were to construe Kaiser's arguments for a JNOV as a request for a new trial in the alternative, we do not believe that substantial justice dictates that a new trial be ordered. *Cf. Scott v. Plante*, 641 F.2d 117, 136 (3d Cir. 1981), *vacated on other grounds*, 458 U.S. 1101 (1982). If the district court committed error, it would have been in its failure to order a full new trial in 1981 when it ordered the limited retrial on damages. In general, the ordering of a new trial is committed to the sound discretion of the district court. In this case, we cannot say that the district abused its discretion. The liability trial was properly conducted and there was no need to expend further judicial resources retrying liability.

In some situations, however, the seventh amendment right to a jury trial is implicated if the issues in the separate retrial on damages are so interwoven with the issues of liability already tried that it is unjust to try the damages separately. *Gasoline Prods. Co. v. Champlin*, 283 U.S. 494, 500 (1931). In this case, it might be argued that the issues are interwoven if the theory of damages relied upon was inconsistent with the liability theory, thus requiring a single jury to resolve the inconsistency. We believe, however, that the issues are not interwoven because the theory of damages was consistent with the theory of liability.

Kaiser claims that Dr. Bowman, the plaintiffs' expert witness at the damages trial, contradicted the theory that the price squeeze was deliberately caused by Kaiser and not the result of natural market forces. First, Dr. Bowman testified that he could estimate a free market price for pipe by using the price of coil as a base figure and then adding to the coil price a certain percentage of the base figure to account for fabrication costs and a reasonable profit. In choosing a base figure, Dr. Bowman used the actual coil prices charged by Alcoa and Reynolds

from 1973 to 1977. Thus, Kaiser charges, the implication of Dr. Bowman's testimony is that the coil prices would have been the same in a free market. However, the theory of liability was not that the prices of the raw materials were too high, but that Kaiser deliberately caused a price squeeze condition. The jury did not find that there was a price conspiracy among Kaiser, Alcoa, and Reynolds. The plaintiff was entitled to show that in a free market, either the pipe prices would have been higher or the raw material prices lower during the period of the price squeeze. In constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative. *See Litton Systems v. American Telephone and Telegraph Co.*, 700 F.2d 785, 822-23 (2d Cir. 1983), *cert. denied*, ____U.S.____, 104 S.Ct. 984 (1984). Dr. Bowman anchored his theory to the actual prices of coil over a five year period. If he had constructed a hypothetical price for coil to calculate a hypothetical price for pipe, his theory would have been far more speculative. Under present circumstances, we do not believe that the implications of Dr. Bowman's testimony were so inconsistent with the plaintiffs' theory of liability as to warrant a new trial.

The second set of statements that Kaiser alleges contradicts and disproves the price squeeze theory was a statement by Dr. Bowman that the free market price of pipe from 1973 to 1977 would have been "substantially similar" to the actual prices for pipe charged by Kaiser. Dr. Bowman, however, testified also that actual pipe prices were "depressed" and "tended to be lower" than this hypothetical free market pipe prices. App. at 6520 and 6531. If actual pipe prices were lower than the hypothetical prices, then his testimony was consistent with the liability theory. The only inconsistency is that Dr. Bowman appeared to contradict himself when he testified that the prices were "substantially similar."

Dr. Bowman's statements are not necessarily inconsistent. His statements applied to a five year period of time. Pipe prices may have been fair over a five year period and still have been depressed during the shorter time period involved in the price squeeze. Further, even if Dr. Bowman's testimony was internally inconsistent, it was an inconsistency entirely before the damages jury. Dr. Bowman's credibility was properly before the damages jury and is not grounds for a new trial.

VI. Bifurcation of Trial on Liability and Damages

Kaiser next argues that because the liability jury did not distinguish among the alleged anticompetitive acts in its determination of causation, the damages jury could not know from what acts they could attribute damages. Thus, Kaiser contends, the issues on liability could not be separately from the issues on damages. We believe that Kaiser has confused the questions of causation and calculation of damages. Causation is an element of liability in this case. *See REA v. Ford Motor Co.*, 560 F.2d 554, 557 (3d Cir.), *cert. denied*, 434 U.S. 923 (1977). The liability jury properly found causation from only those acts which could evince the defendant's willful acquisition or maintenance of a monopoly. *See Brunswick Corp. v. Pueblo Bowling Mat, Inc.*, 429 U.S. 477, 489 (1977). In finding causation, the jury must find the nexus between the act and the injury. Once a jury has properly found causation of antitrust injury from unlawful activity, however, the damages in this case may be determined without strict proof of what act caused which injury as long as the damages are not based upon speculation or guesswork. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983), *cert. denied*, ____U.S. ____, 104 S.Ct. 234 (1983).

Here, this result follows because it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. The

plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business. When the antitrust injury is of an indivisible nature, the courts have permitted a relaxed standard of proof in calculating damages. *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 565-67 (1981); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698 (1962). When the antitrust injury is of an indivisible nature, and the jury properly found that that injury was caused by the defendants' monopolization or attempt to monopolize, and when the plaintiffs' proof of damages does not require distinguishing the various acts by the defendants, then it is unnecessary to segregate the damages according to the specific causes, and therefore, the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both.

VII. Prejudicial Conduct During the Damages Trial

Kaiser contends that the conduct of the damages trial was prejudicial to Kaiser because the jury was informed about some of the anticompetitive acts alleged by the plaintiff. It is of course necessary, when conducting a bifurcated trial before two juries, to inform the second jury about some of the evidence and results of the first trial. *MCI v. American Tel. & Tel. Co.*, 708 F.2d at 1168. This is not to say that the second jury was to evaluate or decide factual issues that were involved in the first trial. In this case, antitrust matters are extremely complex, and it would have been unfair not to give the jury some background material on the trial. Questions of trial conduct are committed to the discretion of the trial court. The trial court attempted to conscientiously balance the need of the jury to know about the case and prejudice to

the defendant. We believe that the district court acted in an exemplary manner in its conduct of an extremely long and complicated trial and did not abuse its discretion in permitting the jury to hear some explanation of the finding of liability.

Kaiser also contends that plaintiffs' counsel repeatedly flouted the district court's rules and referred to prejudicial matters. The district court, after reviewing the entire record, concluded that it was not sufficiently prejudicial to warrant a new trial. We find no abuse of discretion. *See Pitchford v. Pepi*, 531 F.2d 92, 106 (3d Cir.), *cert. denied*, 426 U.S. 926 (1976).

VIII. The Calculation of Damages

With respect to the separate trial of damages, Kaiser raises several issues. First, Kaiser contends that its motion for JNOV should have been granted because the projected market share analysis used for plaintiffs' calculation of lost profits failed to account for competition by other independent pipe fabricators. Kaiser further contends that the failure of an expert to account for significant factors in his analysis was an error of law and subject to plenary review in this court. Presumably, Kaiser must be suggesting that the testimony of plaintiff's expert is inadmissible because it is unsupported; and if it were struck, then the remaining evidence would be insufficient to support the damages verdict and Kaiser would be entitled to a JNOV.

We note that Kaiser neither raised this issue specifically in a motion for a directed verdict, nor did it object to the jury instructions on this matter. Thus, Kaiser is not entitled to a JNOV, nor may it raise this issue on appeal as an error of law. *See infra Section IX*, Fed. R. Civ. P. 50(b), 51; *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3513 (1984); *Herman v. Hess Oil*, 524 F.2d 767 (3d Cir. 1975).

Even if, however, we were to construe Kaiser's motion for a directed verdict to have raised this question, we would not hold that the JNOV should have been granted. The testimony of Dr. Bowman made clear that he was aware of, and accounted for the presence of other aluminum pipe fabricators. His testimony was supported, and therefore, admissible. At best, Kaiser's contentions go to the weight of the evidence and not its admissibility. That, however, was for the jury. *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 108-09 (3d Cir. 1976).

As to Kaiser's remaining contentions on damages, we have examined the record and conclude that the district court did not err in allowing damages for both lost profits and actual losses; nor did the district court err in failing to instruct the jury on plaintiffs' duty to mitigate damages; nor did the district court err in permitting the jury to consider damages for lost profits on projected sales outside of the geographic and product markets stipulated for liability purposes.

IX. The Plaintiffs' Appeal

The district court granted, in part, Kaiser's motion for JNOV as to one aspect of damages. It eliminated the jury award for diminution of going concern value as inappropriate as a matter of law when Columbia had not literally gone out of business as of the date used in the damage calculation.

The plaintiffs contend on their appeal that a grant of a JNOV was improper when Kaiser failed to assert this ground in its motion for a directed verdict at the close of all the evidence. *See* Fed. R. Civ. P. 50(b). Kaiser made an oral motion for a directed verdict at the conclusion of all the evidence on damages. Kaiser specifically asserted three grounds for a directed verdict: (1) the evidence failed to show that the Columbia was injured by Kaiser; (2) the damage calculations included projected sales outside of the stipulated geographic market; and (3)

there was insufficient evidence of a price squeeze. Kaiser never raised in its motion for a directed verdict the contention that damages based on a diminution of going concern value may not be awarded in this case.

The specific grounds for a JNOV must be asserted in the motion for a directed verdict. *Abraham v. Pekarski*, 728 F.2d 167, 172 (3rd Cir.), *cert. denied*, ____U.S.____, 104 S.Ct. 3513 (1984). If the issue was not raised in the motion for the directed verdict at the close of all the evidence, it is improper to grant the JNOV on that issue. *Id. See also Mallick v. IBEW*, 644 F.2d 228, 233-34 (3rd Cir. 1981); *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035-36 (1st Cir. 1984); *U.S. Industries, Inc. v. Blake Const. Co., Inc.*, 671 F.2d 539, 548 (D.C. Cir. 1982).

The requirement that the specific issue be raised first in the motion for a directed verdict, before the issue is submitted to the jury, affords the non-moving party an opportunity to reopen its case and present additional evidence. *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 11 (3rd Cir.), *cert. denied*, 429 U.S. 966 (1976). Further, when a trial court decides an issue after it was properly submitted to the jury, it may deprive the non-moving party of his seventh amendment rights. *Id.*

In this case, Kaiser contends that it raised the issue in a colloquoy with the district court concerning jury instructions. A request for jury instructions may suffice to fulfill the requirement that a motion for a directed verdict be made before granting a JNOV only if it is clear that the district court treated the request as a motion for a directed verdict and ruled on it as such. *Mallick*, 644 F.2d at 234; *Lowenstein*, 536 F.2d at 11. We have studied the record in great detail at the places noted in Kaiser's brief and we can find nothing that would have put the plaintiffs or the district court on notice that after all the evidence had been presented Kaiser was raising an issue as to whether damages for diminution of going concern value could be awarded. The record shows that Kaiser

only objected to the wording of a jury instruction and agreed that the instruction on diminution of going concern value could be submitted to the jury after it was reworded. App. at 7529-31.

Finally, even if, contrary to our conclusion, we were to assume that Kaiser had properly raised the issue in its motion for a directed verdict, it was error for the district court to have ruled for the defendants on this aspect of the motion for a JNOV. The plaintiffs' theory at trial was that damages for diminution of going concern value could be awarded as of the date that Columbia had effectively gone out of business. The plaintiffs argued to the district court that Columbia had ceased manufacturing operations prior to May 31, 1977 and would have gone out of business by that date because of Kaiser's anticompetitive activities if Columbia had not received an Economic Development Administration loan from the United States Department of Commerce. The loan permitted Columbia to continue operations for a few months before it ultimately went out of business and liquidated its assets. The plaintiffs presented evidence to support their theory and the jury was instructed, without objection, as to the plaintiffs' theory.

Kaiser neither submitted contrary jury instructions, nor did it object to the jury instructions as required by Fed.R.Civ.P.51. The district court also specifically asked counsel for Kaiser whether he objected to the plaintiffs' legal basis for seeking damages for diminution of going concern value, and Kaiser's counsel raised no objection to the submission of the issue to the jury. App. at 7529-7531.[4]

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4. For example, the plaintiffs submitted a proposed jury instruction which stated, *inter alia*, "An antitrust plaintiff may recover both lost profits and the value of the business as a going concern as of the date the business terminated or made effectively dormant by the actions of defendants." App. at 5601. Kaiser's counsel, when asked by the district court if he had any objections to the instruction replied, "I don't really have an objection to the description of what

By granting Kaiser's motion for JNOV, the district court effectively repudiated its own jury instructions even though Kaiser had not challenged the legality of the plaintiffs' damages theory. Having properly submitted the issue to the jury, it was error to rule on a JNOV that the plaintiffs, as a matter of law, could not recover for diminution of going concern value on the ground that Columbia had not actually liquidated on the date used for the damages calculation.

We conclude that Kaiser failed to preserve for JNOV consideration the ground relied upon by the district court to grant the JNOV, and that the district court incorrectly decided that the jury determination was erroneous. To the extent that the district court's order granted the motion for a JNOV, it will be reversed.

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the plaintiff is seeking to do here, your Honor. It is just the way this is phrased. It is not really an objection to the concept of the charge." App. at 7531.

X. Conclusion

The order of the district court granting in part the defendant's motion for a JNOV will be reversed. The judgment entered by the district court on January 18, 1983 will be vacated and the judgment entered on December 4, 1981 will be reinstated, and that judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

Judgment of the Court of Appeals

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 83-1047 & 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M.,
and CLISBY, BARBARA K., as Transferrees
in Liquidation and Dissolution of
Columbia Metal Culvert Co., Inc.,

Appellants and Cross-Appellees

v.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY and
KENNEDY CULVERT & SUPPLY COMPANY and
ROBERT KENNEDY

Kaiser Aluminum & Chemical Corporation and
Kaiser Aluminum & Chemical Sales, Inc.,

Appellees and Cross-Appellants

(D.C. Civil No. 74-0122)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered January 18, 1983, which granted in part the defendant's motion for a judgment n.o.v. be and the same is hereby reversed. It is further ordered and adjudged that the judgment of the said District Court entered January 18, 1983, be and the same is hereby vacated and the cause remanded to the said District Court which is directed to reinstate the judgment entered December 4, 1981, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court.

ATTEST

Clerk

December 27, 1984

APPENDIX D

Memorandum and Order of the District Court

June 18, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, *J.* JUNE 18, 1981

INTRODUCTION

Post-trial motions in this antitrust litigation are before the court pursuant to a limited remand order of the United States Court of Appeals for the Third Circuit. Defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") move for a judgment notwithstanding the verdict or, in the alternative, for a new trial, following a jury verdict in

favor of Columbia Metal Culvert Co., Inc. ("Columbia")[1] finding KACC and KACSI in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and awarding damages in the sum of $1,815,000. Judgment was entered for the plaintiff in the trebled amount of $5,445,000.

Columbia originally brought suit against KACC and KACSI and former Columbia salesman Robert A. Kennedy and the company he owned, Kennedy Culvert and Supply, an independent distributor of culvert and drainage pipe manufactured by KACSI. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §15. At the jury trial held before the Hon. Edward N. Cahn, a directed verdict for all defendants was entered at the close of Columbia's case on the ground that Columbia had not made out a *prima facie* case of conspiracy in restraint of trade between KACC/KACSI and the Kennedy defendants. The district court further found that the product market was not limited to aluminum culvert pipe as Columbia had maintained but included culvert pipe whether made from either aluminum or steel. Since the Kaiser share of the aluminum and steel culvert pipe market was concededly not significant, the court held that Kaiser could not have monopoly power. The court further found that no *prima facie* violation of Section 3 of the Clayton Act had been proven. *See, Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum and Chemical Corp.*, Civil Action No. 74-122 (July 20, 1977).

On appeal by Columbia, the Third Circuit reversed in part and affirmed in part. The Court affirmed the grant of a directed verdict in favor of the Kennedy defendants

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1. Upon liquidation of Columbia, all of its claims, rights and interest in this litigation were assigned to its shareholders, Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby; the current named plaintiffs were substituted as parties pursuant to Fed.R.Civ.P. 25(c) by the court's Order of May 30, 1980.

on the issue of conspiracy. The Court also upheld the district court's finding that no *prima facie* case of a Clayton Act violation had been proven. However, the grant of a directed verdict in favor of defendants KACC and KACSI was reversed. The Court held that:

> (1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert only rather than culvert of either aluminum or steel;
>
> (2) There was sufficient evidence to go to the jury on the charge that KACSI and KACC violated §2 of the Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market; and
>
> (3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of §1 of the Sherman Act.

Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 37 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

A bifurcated trial before this court resulted in a determination of defendants' liability in answer to special interrogatories (attached to this opinion as Appendix A); the jury found that the relevant product market was for aluminum culvert pipe, that defendants KACC and KACSI had monopolized, attempted to monopolize, and conspired to monopolize this market in violation of Section 2 of the Sherman Act; that KACC and KACSI had conspired in violation of Section 1 of the Sherman Act; and that Columbia had been injured by the unlawful acts of KACC and KACSI.

The jury then awarded damages in the amount of $1,048,000 for lost profits, $710,000 for the destruction of Columbia as a going concern, and $57,000 for the cost

of extra metal (relating to Columbia's spiral machine for making pipe), a total of $1,815,000, which trebled resulted in a judgment of $5,445,000. Following a second appeal, the case was remanded to the district court for disposition of post-trial motions.[2] (Docket Entry #426). Columbia having won a jury verdict at trial, we consider the following facts in the light most favorable to plaintiff.

Columbia was a company specializing in the manufacture and marketing of aluminum culvert pipe with a plant in Vineland, New Jersey. KACC manufactures aluminum sheet and coil from which aluminum culvert pipe is constructed and conveys these materials to its wholly-owned subsidiary KACSI, which in turn sells the sheet and coil to pipe manufacturers such as Columbia. KACSI also fabricates and sells aluminum culvert pipe itself in competition with the fabricators to whom it supplies sheet and coil.

These three entities had a successful business relationship for many years during which Kaiser was Columbia's main material supplier. Beginning in 1971, a four-pronged effort took place to put Columbia out of business in retaliation for Columbia's placing of aluminum orders with Reynolds Aluminum. This KACC/KACSI effort included a refusal to sell to Columbia, a decision to locate a new culvert manufacturing plant within fifty miles of Columbia's plant, setting up Robert A. Kennedy, Columbia's best salesman, in business as an independent distributor of KACSI products, and a "price squeeze" by KACC and KACSI, accomplished by transferring sheet and coil from KACC to KACSI below cost. This allowed KACSI to make a profit on sales of pipe at prices which Columbia could not match; the price of aluminum was increasing and the supply of the metal was severally limited.

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2. A direct appeal was taken because defendants failed to file post-trial motions timely. The Court of Appeals, upon defendants' motion, allowed a limited remand to this court to have the benefit of the trial judge's views upon the issues in contention.

The Kaiser defendants move this court for a judgment notwithstanding the verdict, on the ground that Columbia produced insufficient evidence to support the verdict in several material respects. In the alternative, defendants move for a new trial on the ground that the verdict was contrary to law, against the weight of the evidence, and that the court erred in certain evidentiary rulings, in jury instructions, and in submission of certain interrogatories to the jury.

In ruling on a motion for judgment N.O.V., "it is the duty of the trial court to take that view of the evidence most favorable to the party against whom the motion is made, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for him." 6A *Moore's Federal Practice* §59.08[5] at pg. 59-152 (1979). On the other hand, a motion for new trial, on the ground that the verdict was against the weight of the evidence, is addressed to the sound discretion of the trial court. *Id.*

POST-TRIAL MOTIONS — LIABILITY

Defendants' contentions must fail in view of the Circuit Court's opinion in *Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corporation*, 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978) and the doctrine of the law of the case.

As noted in *Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976):

> This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented in that former appeal, *unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal*, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless the decision is clearly erroneous and works

> manifest injustice. (emphasis supplied, citations omitted).

See, e.g., United States v. American Bag & Paper Corp., 609 F.2d 1066, 1067, n.3 (3d Cir. 1979) (determination by panel of Court of Appeals was law of the case and later panel was bound by it); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 482 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979) (Court of Appeals' prior opinions were law governing the case with respect to question of whether it was permissible to remand plaintiff's due process claims to district court and district court's observations on remand were of no effect); *Chlystek v. Kane*, 540 F.2d 171, 173 (3d Cir. 1976) (Court of Appeals governed by law of the case from prior appeal with respect to whether a substantial federal question was present); *Spock v. David*, 502 F.2d 953, 955 (3d Cir. 1974), *reversed on other grounds*, 424 U.S. 828 (1976) (on essentially the same record as was before the Court of Appeals prior to remand, both the district court on remand and the panel of the Court of Appeals on appeal following remand were bound, with respect to issue decided by the Court of Appeals prior to remand, by decision on that issue as the law of the case); *A.M. Webb & Co. v. Robert P. Miller Co.*, 176 F.2d 678, 680-81 (3d Cir. 1946) (on trial after remand of case, questions settled by Court of Appeals could not be relitigated); *Moyer v. Aetna Life Insurance Co.*, 126 F.2d 141, 143 (3d Cir. 1942) (law of case on prior appeal as to sufficiency of the evidence on certain points precluded reconsideration thereof upon defendant's appeal of district court denial of judgment N.O.V. after second trial).

This court is bound by the Third Circuit's decision on issues presented and decided explicitly or implicitly in the prior appeal. *See, Todd and Company, Inc. v. SEC*, 637 F.2d 154 (3d Cir. 1980). For this reason we reject Kaiser's initial contention in its brief in support of post-trial motions, that because KACSI is "wholly owned and

controlled" by KACC (Defendant's Brief in Support of Motions at 2), the two corporate entities are incapable of a conspiracy for lack of the requisite plurality of actors. The Third Circuit explicitly rejected this argument as "not well-founded in law," and reaffirmed the viability of the "intra-enterprise conspiracy theory" as applied to separate corporate entities. *Columbia Metal, supra* at 33. *See, Cromar Company v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 511 (3d Cir. 1976) (absence of the appearance of competition between parent corporation and wholly-owned subsidiary not a bar to Section 1 Sherman Act liability.) This court may not reconsider that determination.

A similar fate befalls Kaiser's contention that there was insufficient evidence to support a finding of an unlawful conspiracy between KACC and KACSI, insufficient evidence to support a finding that KACC or KACSI had a specific intent to monopolize or to wilfully maintain monopoly power, insufficient evidence to support a finding that the relevant product market was aluminum culvert and drainage pipe alone, and insufficient evidence to support the court's charge on the price squeeze issue. The Third Circuit explicitly found the evidence sufficient to allow a jury to find for Columbia on each of these points. *Columbia, supra* at 37.

The law of the case doctrine precludes a reconsideration of that determination unless the evidence at the second trial was *substantially* different from that considered by the appellate court. *Otten, supra.* However, the evidence which the Court of Appeals found sufficient as to each of these points was substantially repeated in the second trial.

Product Market

The evidence persuasive to the Third Circuit on the product market issue, *Columbia, supra* at 29-31, essentially repeated itself at the second trial. For example,

there again was testimony that aluminum is a specialty material[3] and that there are specialized vendors of aluminum products.[4] Several witnesses testified that the physical properties of the three types of manufactured culvert pipe, steel, concrete and aluminum, differ significantly.[5] Because of these differences, evidence at the second trial again showed that specifications for construction projects require one type of culvert rather than another.[6] From this evidence a jury might infer that distinct markets exist for aluminum, steel and concrete pipe, at least from the contractor's point of view. *See, Columbia, supra,* at 28.

The record here shows, as did the record before the Court of Appeals, that a jury would not act unreasonably in finding that, "patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market." *Columbia, supra* at 28. Again, there is testimony that price was not a crucial factor in these engineering decisions[7] and that the three culvert products are neither interchangeable nor in competition from an engineering standpoint.[8]

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3. *E.g.*, N.T. 248 (Bonjorno) (". . . aluminum was always a specialty product. It was during the sixties, and it was during the early seventies, and it was at the period and point in time that we're talking about . . . ."); N.T. 681 (Arvay) (". . . aluminum again becomes a very highly specialized product . . . ."); *See*, Plaintiff's Brief in Opposition to Defendants' Motions at 9.

4. *E.g.*, N.T. 2848 (specialized in aluminum "as far as a storm drainage product . . . ."); N.T. 17 (Bonjorno).

5. *E.g.*, N.T. 874, 879, 882-883, 885-886, 888-889, 893-894 (Elam). *See*, Plaintiff's Brief in Opposition to Defendants' Motions at 9.

6. *E.g.*, N.T. 904, 915, 916 (Elam); N.T. 1698 (Price).

7. *E.g.*, N.T. 919 (Elam) (". . . you are going to specify that product in most instances where price is not even a factor . . ."); N.T. 680 (Arvay) (". . . as far as the price situation is concerned, that is not the concern to them . . . ."); N.T. 1701 (Price); *See*, Plaintiff's Brief in Opposition to Defendants' Motions at p. 8.

8. *E.g.*, N.T. 1408 (Chafin) (". . . it [aluminum] has inherent characteristics which are different from the other materials . . .");

Defendants also argue that steel and aluminum culvert may share the same production facilities as an indicia of products in the same market for Sherman Act purposes. The fact that the same production facilities can be used to turn out steel and aluminum culvert and even the fact that companies often manufacture both products is insufficient to preclude the existence of separate markets as a matter of law; *Columbia, supra*, at 29 n.30.

Defendants vigorously assert that the evidence does not support the jury's finding of an aluminum culvert product market. (*See*, Defendants' Brief in Support of Motions at pp. 99-109). Defendants point to extensive testimony, particularly that of defendants' expert, Dr. Epstein, supportive of their view. But the jury rejected defendants' testimony on these points and accepted that of the plaintiff; the Court of Appeals has already determined that plaintiff's evidence would reasonably support such a jury finding.

Thus this court accepts the jury finding of an aluminum culvert pipe product market, as sufficiently supported by the evidence.

Unlawful Conspiracy Between KACC and KACSI

The evidence found sufficient to prove unlawful conspiracy between the defendants, *Columbia, supra* at 34-35, was also placed before the jury in the second trial. Again there was evidence that KACC and KACSI combined to impose a price squeeze. For example, there was evidence from which the jury could infer that Collins of

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N.T. 918 (Elam):

> "Q. Now taking your professional group, the Drainage Engineers and engineers who design drainage systems and design culvert and specify different commodities of culvert, in your opinion, does that group view these products, steel, aluminum and concrete as interchangeable?"
>
> "A. No, I don't think they do."

KACSI had no part in setting the specification price of coil, which was a KACC price (N.T. 171, 1972, 1957), that Collins was chastised by KACC for not getting prices up high enough (P-950, N.T. 2277, 2281, 2560), that Collins reported to the Sheet and Plate Division of KACC (N.T. 2307, 1718-20), that someone higher than Collins was responsible for the price increase crucial to this litigation (N.T. 1972), that KACC transferred coil to KACSI below cost (N.T. 1964, P-823) and that Collins' request for a plant in New Castle, Delaware was approved by KACC (N.T. 1792, 2114, 2317, 2372, 1976, P-204, 210). *See*, Plaintiff's Brief in Opposition to Defendants' Motions at pp. 12-13. From this and other information adduced at trial, the jury might again infer that "the pricing policies of KACSI were not independent . . . but rather arrived at jointly with KACC." *Columbia*, 579 F.2d at 35. Although there was evidence from which a contrary finding might have been made (*see*, defendants' Brief in Support of Motions at pp. 32-59), we find the evidence was sufficient to support the jury's conclusion that KACC and its wholly-owned subsidiary, KACSI, conspired in violation of the Sherman Act.

Intent to Monopolize

Defendants argue that plaintiff's evidence was insufficient to support the jury's finding that the Kaiser defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act (*see*, Defendants' Brief in Support of Motions at pp. 60-99). Judge Cahn's directed verdict for defendants on this issue at the first trial resulted from his related finding that steel and aluminum, rather than aluminum culvert pipe alone, must constitute the relevant product market. The Third Circuit, as discussed above, found that it was not unreasonable to conclude that culvert pipe alone constituted a relevant market, and therefore that "the foundation of the directed verdict on the §2 count collapses." *Colum-*

bia, 579 F.2d at 31. The Court of Appeals also stated that there was sufficient evidence to infer that KACSI, an entity controlling 80% of the market, attempted to drive Columbia out of business. *Columbia*, 579 F.2d at 31. That same evidence persuasive to the Court of Appeals was presented to the jury at the second trial. Holmes Collins' threat to place an aluminum culvert plant near Columbia if Columbia purchased from Reynolds, and the later placement of a plant in New Castle, Delaware (N.T. 1228) that was originally planned for Virginia (N.T. 1533, 1540-1541, 1730), were submitted to the jury. Again, there was evidence that, "transportation of culvert is a significant item of expense for the product in question and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery" (*Columbia*, *supra* at 31), from which the jury might infer intentional harm caused Columbia by Kaiser's placement of its plant (N.T. 2317-2318, 2840). Again, an inference could be drawn from evidence that the Delaware KACSI plant sold culvert at lower prices than other plants even though Delaware costs were no lower (N.T 1734, 2544-2545), that KACC transferred sheet and coil to KACSI at an accounting price less than production cost and well below market price (N.T. 1964, 3654), and that Collins of KACSI extended credit to Kennedy, formerly a Columbia salesman, against the recommendation of the KACSI credit department (N.T. 1849-1863, 2525-2529, 2842-2849, 2854, 2997, Exhibits P-75, P-24, P-5). The Arvay testimony, specifically noted by the Third Circuit, *Columbia*, *supra* at 31, n.43, again supported plaintiff's theory (N.T. 719, 729, 752). Finally, an inference that Kaiser controlled more than 80% of the relevant market was again reasonably supported by the evidence. (N.T. 73-75, 780, 1261, 1809, 1810, 1814, 2509, Exhibit P-201). Therefore, the evidence was sufficient to support

the jury's conclusion that the defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act.

In summary, on the liability issues, the evidence on retrial was not substantially different from that considered by the appellate court and must be deemed sufficient to support the jury's finding in favor of the plaintiff. Moreover, not only was the evidence sufficient, the court in the exercise of its discretion does not find the jury's determination so against the weight of the evidence as to shock the conscience of the court. Therefore, a new trial would be denied on all issues of liability. The court has carefully considered all other grounds raised by defendants in their motion for judgment notwithstanding the verdict and, with the exception of ground eleven (11) relating to damages and discussed *infra*, determines them to be without merit.

DAMAGES

The trial of this matter having been bifurcated, after the jury verdict on liability against defendants, two days of testimony on damages followed; the jury, again upon answers to special interrogatories (attached hereto as Appendix B), then found damages in favor of plaintiff in these amounts: 1) $57,000 for increased costs of metal; 2) $1,048,000 for lost profits; and 3) $710,000 for the reduction in the value of Columbia as a going concern. The total damage award by the jury was $1,815,000. The jury's award was trebled in accordance with the remedy provided in Section Four of the Clayton Act, 15 U.S.C. §15; the final judgment in plaintiff's favor is in the amount of $5,445,000.

Defendants raise numerous objections as to the award of damages.

Causation

Defendants argue that plaintiff did not establish the requisite causal link, under Section Four of the Clayton Act, between the financial damage suffered by Columbia and the defendants' violation of the antitrust laws. Defendants assert that they are entitled to judgment in their favor if the damages to the plaintiff were caused in whole or in part by factors other than defendants' violations of the antitrust laws.[9] Defendants assert that Joseph Bonjorno, Columbia's chief witness and shareholder, on cross-examination identified several reasons, other than defendants' activities, for losses suffered by Columbia during the relevant time period. Among those causes cited by defendants are: the recession in the construction industry,[10] a nationwide aluminum shortage,[11] the inability of Columbia to obtain price protection from suppliers,[12] and the unstable financial condition of Columbia's chief financial backer, George Kerr.[13]

Damages attributable to an antitrust violation are recoverable even when factors other than defendant's wrongful acts alone may have contributed to the plaintiff's injury. 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] (1978). In this case there was sufficient evidence, if accepted by the jury, to show that Columbia's business decline was caused by Kaiser's illegal activity. Mr. Bonjorno stated repeatedly, both on direct and on cross-examination, that the injury to Columbia was caused by Kaiser's illegal activity.[14] He also stated that in projecting damage figures he had considered the legal competition of others in the marketplace. (N.T. 3971). He further stated that the damage projec-

9. *See*, Defendants' Brief in Support of Motions for Judgment N.O.V. or for a New Trial at p. 11 (citing cases).

10. *See*, N.T. 3903-3905.

11. *See*, N.T. 3908-3909.

12. *See*, N.T. 3911-3918.

13. *See*, N.T. 3919-3920.

14. *E.g.*, N.T. 3864, 3865, 3902, 3904.

tions did not go beyond a point where it was simply too difficult to determine "who was responsible for what" (N.T. 3858). When cross-examined as to other possible causal factors in Columbia's decline, Bonjorno either asserted that these factors were not significant or that Kaiser's illegal activity had made Columbia particularly vulnerable to troubles that, absent such wrongdoing, would not have created financial problems.[15] The jury had before it, through this adept cross-examination, those other factors. However, the jury found that Kaiser's illegal activity caused the financial harm suffered by Columbia. Damages for injury by antitrust violations may be implied even though other factors may have contributed to the injury. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946); *Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962). Here, plaintiff did show, with the requisite reasonable certainty, an injury in consequence of Kaiser's conduct. *See, Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1976), *cert. denied*, 426 U.S. 935 (1976). Judgment notwithstanding the verdict on causation would be improper.

Duplication in Damages Award

Defendants assert that, when the jury returned a verdict of $1,048,000 for loss of profits during 1974-1977 and $710,000 for the reduction in the value of plaintiff's business as a going concern as of May 1, 1977, Columbia was awarded a double recovery for the same loss. Defendants' theory for this duplication argument is not clear but seems to include these contentions. Defendants first argue that plaintiff's recovery of lost profits in this action together with the amount received from the sale of Columbia's assets to Howmet in 1977 for $574,000 fully compensated plaintiff for its losses because the value of Columbia as a going concern was the

15. *E.g.*, N.T. 3907, 3908, 3910, 3912, 3913.

amount received from Howmet at the time of sale. Receiving damages for business as a going concern under this theory duplicates the money paid Columbia by Howmet in 1977 *not* the lost profits awarded by the jury at trial. A part of this argument is that either Howmet paid for Columbia's total going concern value as of May, 1977 (including goodwill) or that Howmet bought only Columbia's assets; *i.e.*, all Columbia had left at that time, as Columbia itself asserts. If the latter is the case, Kaiser argues that projected lost future profits should not add to a going concern value since Columbia, defunct as of 1977, could have no future profits.

Defendants next contend that the method of calculating the damage to Columbia as a going concern caused a duplication between the two theories of damage recovery. Defendants state that the same figures used to calculate past lost profits, were used to project Columbia's profits into the future, post 1977, to arrive at a going concern value. (A going concern value indirectly reflects future profits as "[t]he current market value of a business is, in theory, the discounted present value of the estimated flow of future earnings." *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, 1023 (D.N.J. 1976), *reversed on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) *rehearing denied*, 438 U.S. 908 (1978).) This, defendants maintain, created an impermissible duplication since the same figures establish both damage theories.[16] Finally, defendants argue that a recovery for going concern value and lost profits is generally not allowed.

We will deal with the last contention first. As noted in 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[1] (1978), "there are three types of damages that a successful antitrust plaintiff may recover under Section 4: (1) increased costs; (2) lost past net profits; and (3) reduction in the value of the business. *Absent*

16. *See*, Defendant's reply brief at p. 51.

unique circumstances, these three types are not duplicative of each other." (emphasis supplied). Numerous cases support this general proposition. *See, Story Parchment Co. v. Patterson Parchment Paper Company*, 282 U.S. 555, 561 (1931) ("[t]he trial court submitted to the jury for consideration only two items of damages, (1) the difference, if any, between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents' and (2) the extent to which the value of the petitioner's property had been diminished as the result of such acts."); *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, *supra*, (involved damages for both lost profits and going concern value); *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081 (2d Cir. 1980) ("[t]he district court ruled that ABP was entitled to compensation for two categories of injuries — lost profits on sales that were prevented prior to the termination of its Sony dealership, and the reduction in the value of ABP's business resulting from the termination"); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (lost profits and goodwill loss, determined in part by reference to potential for future profits); *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971) (sufficient compensation included damages in amount of profits lost prior to the forced sale of the business *plus* its full market value, absent the illegal practices). Thus in this case, absent some unique circumstance, it is clear that plaintiff is entitled to both the lost past profits as of the time of the sale to Howmet and the value of the business, as it would have been absent defendants' violation of law, in May of 1977 upon Columbia's termination.

Defendants claim that the method of calculating going concern value created duplication in the damages award since going concern value was calculated, in part, by using the past lost profit figures in order to project potential future profits. Defendants assert that this method allowed plaintiff to recover its lost profits twice.

However, several cases, discussing damages calculations in the antitrust area, have explicitly or implicitly endorsed this method of determining going concern value. For example, in *Eiberger, supra*, at pp. 1081-1082, n.25, the court stated:

> 25. Although it is unclear, Sonam may also be arguing that the district court erred when it included in the one-year base period figures an amount for profits that ABP would have earned on sales lost as a result of Sonam's intimidation. Such an argument is clearly incorrect. ABP is entitled to an award that covers all of the profits it would have earned but for Sonam's violation: these include both the profits lost while ABP was still an authorized dealer, and the profits it would have earned after that point, which when capitalized equal 'going concern' value of the lost portion of ABP's business. *See, Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 80-82 (1st Cir. 1970). *To exclude lost profits from the base period figures used to project the latter component would be to reduce plaintiff's award for the later period precisely because defendant's intimidation had been successful in the base period. Such a reduction would obviously be improper.* (emphasis supplied).

Similarly, in this case, it was appropriate that the calculation of Columbia's value as a going concern included as its base figure, not the past profits depressed by defendants' violations, but the past profit history as it would have been but for the violation.

Of similar import is *Copper Liquor, Inc. v. Adolph Coors Co., supra* at 579 n.9, where the court described the calculation of a retail liquor store's goodwill value, in

a case where plaintiff sought both lost profits and good will:[17]

> 9. Relying on the assumption that the store reduced its markup from 25 percent to 15 percent in 1966, Green calculated the store's goodwill value by adding the lost gross profits for each year of the store's operation to the net profits for the store as they appeared on the store's corporate income tax returns. The sum of lost gross profits and net profits for the four years, 1967 to 1971, was identified as adjusted net income. Adjusted net income, in the amount of $100,046, was divided by the number of years to obtain average net income. Mr. Green then subtracted from average net income the store's return on capital computed at 6 percent per year to derive average net income after return on investments. This figure, $21,980, was multiplied by five to arrive at a goodwill value of $109,899.

Again past lost profits were taken into account in the figure from which goodwill was projected. Finally, by way of example, the district court in *Glauser, supra* at 1023 n.14, made the following observations on this point:

> 14. Since the challenged practices continued for several years leading up to the elimination of Glauser Dodge from the marketplace, the plaintiff properly presented to the jury estimates of the value of the business as a going concern based upon its actual performance in prior years *and, alternatively, based upon the earnings which the business would have had absent the defendants' unlawful conduct*. (emphasis supplied).

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17. "Valuing a business's goodwill, of course, is a subjective determination that takes into consideration factors such as a business's age, profit history, customers, and *potential for future earnings*." (emphasis supplied). Copper Liquor Co., *supra*, at 579 n.8.

In the instant situation, then, we find no merit to defendant's contention that the method of computation used in this case created a duplication.[18] Rather, by adding Columbia's estimated profit figures in those prior years and then projecting forward for future profits, Columbia quite appropriately measured its value as a going concern from its estimated 1977 condition had there been no prior damage caused by defendants. Necessarily, this method creates a projection based upon a projection but it is defendants' prior misdeeds that make such a formulation necessary.

Finally, we consider defendants' contention that Columbia's recovery for going concern value duplicated the amount received in 1977 when Columbia transacted its sale to Howmet. Plaintiff asserts that the transaction with Howmet was a sale of assets only, since Columbia, having been destroyed as a business by Kaiser, had no good will value left. Both Bonjorno [19] and Dr. Kuehn so

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18. Defendants' cited cases can be read to support plaintiff's position. Rea v. Ford Motor Company, 497 F.2d 577 (3d Cir. 1974), *cert. denied*, 419 U.S. 868 (1974), involved a finding of double recovery under the Automobile Dealer's Act where the damages for lost future profits did not reflect the fact that plaintiff had sold certain assets for $60,000. Defendants cite it for that proposition. However, the court in Rea, at 587 n.19, stated that "neither the trial judge's instructions on damages nor Dr. Staelin's estimate made mention of or took into account the benefit 22 Ford received from the cash . . ." Clearly the Howmet purchase price was taken into account in this case; defendants' in their Reply Brief at p. 51 note Dr. Kuehn's assumptions regarding the Howmet sale in the going concern value computation. Also, in Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969), *supp. order*, 421 F.2d 91 (1st Cir. 1979), cited by defendants, the court allowed plaintiff to recover both its lost profits to the date it went out of business and the going concern value of the plaintiff on that date.

19. N.T. 3864 (Bonjorno):

> "A. Well, we — as long as we were operating we had our good name. We had our reputation and our ability to manufacture a high quality product, our ability to work and get our product specified. This as all part of Columbia Metal and its good

testified.[20] If this is the case, Kaiser argues that there was no reasonable prospect that Columbia would have earned profits in the future. However, Columbia's value as a going concern, that is its market value to Howmet, would certainly have been greater if its goodwill, and thus its potential for future profit, were intact.[21] If Howmet paid only for tangible assets, Columbia did not receive the worth of its business absent the violation which destroyed its goodwill. If Columbia indeed had no reasonable prospect of future profits, that indicates more damage to Columbia, not less damage to its going concern value.

As an alternative characterization, defendants assert that whatever intangible value Columbia had, assuming it had some, was paid for by its 1977 purchase by Howmet. It was plaintiff's express assumption that

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NOTES *(Continued)*

name in the aluminum culvert pipe industry in the trading area, and they effectively destroyed this.

Q. Who is they?

A. Kaiser Aluminum."

20. N.T. 4041 (Kuehn):

"Q. Well, do you make an assumption as to what the actual value was as a going concern on May 31, 1977?

A. Yes.

Q. What is that?

A. Well, the assumption is that the value of the firm on that date was limited to physical assets, and consequently that there was no operating value beyond the sheer value of the assets that existed.

Q. And based on what you know about this case, is that a reasonable assumption?

A. Given that — given the actual operation of the firm in the previous years in the damaged state, I would say yes."

21. *See,* Copper Liquor, Inc., *supra,* at 579 n.8:

"According to Cook's expert, Wayne Peters, goodwill is the amount that a purchaser would be willing to pay for a business *over and above the value of the business's tangible assets.* Valuing a business's goodwill, of course, is a subjective determination that takes into account factors such as *potential for future profit.*" (emphasis supplied).

Howmet bought only tangible assets (N.T. 4041) and that its projection of ". . . the value of the business was computed in terms of whether the rates of return from the operation of this business in the absence of damage produced or would have produced a return in excess of the profits that might be expected from the tangible assets alone. In other words, was there additional profit that would then be attributed to intangibles which would indicate some value of good will relative to the operation of the business." (N.T. 4039-4040). *Compare, Pitchford v. PEPI, Inc.*, 531 F.2d 91 (3d Cir. 1975) (failure to deduct Mr. Pitchford's salary as a cost of operation from data used to project potential earnings for the purpose of evaluating the lost going concern value of Pitchford created a double recovery).

On cross-examination, Dr. Kuehn, confronted with the purchase agreement between Howmet and Columbia, which allocated $16,000 of the purchase price for intangibles,[22] stated that amount should be subtracted from certain of his estimates, since his projections assumed the Howmet sale involved assets only.[23] Whatever amount was actually received for intangibles must be subtracted from the estimates to avoid an award of damages for an amount that is duplicative in the sense that it has already been recovered.

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22. Corporate name and covenant not to compete.

23. N.T. 4149 (Kuehn):

> "According to the figure I just saw, the purchase price of the tangible assets apparently would be $564,000 and consequently, if I understand it correctly, $16,000 should probably be subtracted from the various estimates presented here on the bottom lines for both the capitalization at 15% and the capitalization at 20%."

However, Dr. Kuehn also indicated that the two items on the intangibles line of the purchase agreement actually had no worth. *See*, N.T. 4146 (corporate name); N.T. 4147 (covenant not to compete). (For the other inadequacies of Dr. Kuehn's testimony, see N.T. 4018-4019, 4050-4051, 4089, 4092-4093, 4108-4109, 4111.)

Increase in Metal Costs

Plaintiff claimed damages for lost profits for the years 1974, 1975 and 1976 but in addition made a specific claim for extra costs attributable to an increase in the amount of aluminum coil used in 1971, 1972 and 1973; plaintiff contended this increase in metal cost was caused by the misrepresentations of defendants concerning the gauge of aluminum Kaiser would continue to use. The Stamco machine plaintiff installed in the spring of 1970 utilized a 2-inch gauge because Kaiser used that gauge; the rest of the industry used a 2⅔-inch gauge. Kaiser, which had used 2 inch, then converted to 2⅔-inches; plaintiff contends that Kaiser concealed its intention to do this to put plaintiff at a competitive disadvantage. This had been presented to the jury during the trial on liability, not as an antitrust violation in itself but as a part of a pattern of conduct from which retaliatory conduct could be inferred. Plaintiff admitted it could not isolate damages for other aspects of its proof on retaliatory conduct but urged that a finding of specific damages for extra use of coil was appropriate. Because plaintiff stated to the jury that damages would be claimed only for 1974, 1975 and 1976, the court was in error in allowing the extra cost of metal for prior years to go to the jury as a separate item of damages; that plaintiff was able to isolate it as a matter of proof (N.T. 3981-3995) is not a sufficient reason to allow it as an item of damages in the context of the trial as a whole. Therefore, the award of $57,000 ($171,000 trebled) is set aside and the defendants' motion for judgment notwithstanding the verdict is granted as to that amount.

Sufficiency of the Evidence as to Amount of Damages

We recognize that once the fact of injury has been proven, the burden on the antitrust plaintiff to establish the "precise amount of damages is not as great as in other kinds of lawsuits." 15 ANTITRUST LAWS AND

TRADE REGULATION §115.01[2] at 115-5 (1978). *See, J. Truett Payne Co. Inc. v. Chrysler Motors Corporation*, 49 U.S.L.W. 4516 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (less rigid standard of proof with respect to amount of damages caused by an antitrust violation); *Hobart Brothers Co. v. Malcolm T. Gilliland Inc.*, 471 F.2d 894, 902 (5th Cir. 1973), *cert. denied*, 412 U.S. 923 (1973) ("[i]n an anti-trust case the burden on the plaintiff to prove the amount of damages is less severe than the burden to prove the fact of injury . . . ."); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 796 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), *rehearing denied*, 404 U.S. 877 (1971) ("The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections . . . "). However, a plaintiff must offer proof as to the extent of injury, showing that the damage involved is measurable in dollars. *See, Deaktor v. Fox Grocery Company*, 475 F.2d 1112 (3d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973). Further courts have stated repeatedly that the measure of damages may not be based upon mere guesswork, speculation, or conjecture. *E.g., Bigelow v. RKO Radio Pictures, Inc., supra; Story Parchment Co. v. Paterson Parchment Paper Co., supra; Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

Although plaintiff did show economic injury in consequence of defendants' conduct, the evidence presented by Columbia as to the actual dollar amount of damages suffered was so deficient as to require a new trial on damages only. The evidence presented by Columbia's two damages witnesses, Bonjorno and plaintiff's expert witness on damages, Dr. Alfred Kuehn, was incomplete, confusing and generally lacking in probative value. The factual basis of the projections, predic-

tions and calculations presented by them was never clear from the testimony.

Plaintiff estimated damages sustained in lost profits and in the decline in value of the business as a going concern by using four projection Methods (Methods C, D, E, and F). Method C (P-3012), projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while Method E (P-3014) used Kaiser sales from the New Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing.

The testimony of an antitrust plaintiff who is an owner or officer of the damaged business may be sufficient to support a jury verdict on damages where the owner is qualified by experience and position to make damages estimates. *See, generally, Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969) (Zenith's officers, experienced businessmen, testified that repressive effects on Zenith were due to patent pool; no basis in record for refusing to accept testimony of the two officers as probative evidence); *Greyhound Computer v. International Business Machines*, 559 F.2d 488, 507 n.41 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (most of the damages testimony came from Greyhound's president; where the record reflects his competency and the factual basis for his conclusion, an interested witness may testify as to the amount of damage and it is for the jury to determine the weight to be accorded his testimony); *Kestenaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (wholesale distributor's estimation of good will value of his business admissible in antitrust suit as an owner is competent to give his opinion on the value of his property; weight and

credibility given owner's testimony is generally for the jury); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 394 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) ("We do not hold or imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions. . . .").

But an inexperienced owner using purely speculative bases for his estimations of damage may provide testimony of such minimal probative force as to warrant a judge's refusal to submit the issue to the jury. *See, Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961, *cert. denied*, 369 U.S. 839 (1962). It follows that such testimony would justify the grant of a new trial in the exercise of the court's discretion.

We do not find that Mr. Bonjorno was an inexperienced owner who was not qualified to make damage estimates. Bonjorno started Columbia in 1959 and performed proprietary, managerial and sales functions from Columbia's beginning until its assets were sold in 1977. However, we do find the record insufficient in establishing the requisite factual basis for Bonjorno's estimates so that the jury could make a rational determination as to their accuracy.

For example, Bonjorno estimated Columbia's return on sales at 17.6% for 1974, 12% for 1976 and 8% for 1977, all significantly higher than that of any previous year of Columbia's operation; the previous high was only 5.8%. Bonjorno's explanation for this increase demonstrates the minimal evidence upon which this five million dollar verdict rests:

N.T. pp. 3959-3960:

"Q. What was the reason why you projected so much greater profitability in 1974 than you had experienced in your entire history?

A. A number of reasons, Mr. McElroy.

Number one, we would have had a much lower metal cost due to the new configuration. The fact that we were making standard corrugated pipe meant that the material costs would be down by approximately 4 to 5%.

Q. All right.

A. We now were in a position to offer perforated pipe made on our own perforating mill, which would have been a highly profitable product, also, and would have given us an access to other markets.

It would have also given us a much higher percentage of profit in those areas that were remote to southern New Jersey, because the prices were better in areas away from southern New Jersey than they were in the southern New Jersey area, so that we felt we would have a substantially greater margin of profit on the sales that we projected.

Q. So that you would have increased your profitability from 2.6% to 17.6% in one year? That's an increase of 15%.

A. I thought that was reasonable."

N.T. pp. 3958-3959

"Q. You've projected, in 1974, $1,805,569 in sales and you have an income of $318,683.

Do you know what that percentage is?

A. It looks like its around 15%. I'm not sure without calculating it.

Q. It is 17.6%. 17.6%.

Now, on Exhibit 3062 is there any year in which return on sales exceeded 10%?

A. No, there is not.

Q. Is there any year in which it exceeded 5%?

A. No, there is not.

Q. Isn't there one? 1971?

A. 5.8. I'm sorry.

Q. 5.8% and that was the best year, 5.8%?

A. Yes.

Q. And yet, you projected an income of 17.6% here?

A. Yes."

Also troubling was Bonjorño's estimate as to the pounds of metal sold in 1973 by Columbia, a critical figure since 1973 was the base year selected by the plaintiff as his starting point for all other damage calculations and projections. Although Bonjorno did state a figure before the jury (N.T. 3932: "[a]pproximately, I think they are about 2.3 or 2.4 million pounds, approximately."), the basis in fact or source of the figure was never explained. (N.T. 3932-3942). For example, at N.T. 3933,

"Q. And did you make a compilation for this trial so you could present it to the Court and jury of what the number of pounds were of metal that Columbia sold in 1973?

A. No.

Q. Didn't counsel or anybody — wasn't anybody assigned to go through the records to find out exactly what the total number of pounds was?

A. It's possible, but I didn't do it.

Q. And you are unaware of anybody else doing it?

A. It's possible that counsel may have done it. I am sorry, maybe I misunderstood your question.

Q. My question was, do you know whether anybody did it or not?

A. I don't know specifically.

That the jury was unpersuaded by the Bonjorno testimony is plain from its damage verdict on lost profits which virtually cuts the Bonjorno estimate in half. The Bonjorno testimony of his hopes and aspirations fails to provide evidence of facts from which the jury's calculation may be logically and legally inferred.

There are similar problems regarding the damages testimony of the expert, Dr. Kuehn. Again, the problem of the pound figure for 1973 without a source appears.

"Q. Why did you convert it back to pounds?

A. Only to provide a base number for the subsequent calculation of other ratios.

Q. But the number of pounds doesn't represent what Columbia actually sold in 1973, does it?

A. I —

Q. That you calculated.

A. Since I am not sure that anyone knows precisely what the pounds are, it probably doesn't represent accurately, but it's the calculation that was obtained this way and which Mr. Bonjorno considered a fairly accurate estimate of what the actual figure was during that period.

Q. Did you review any of Columbia's books and records to determine whether or not your estimate of the number of pounds sold by Columbia for fiscal year ending May 1, 1973, was accurate or not?

A. I reviewed some records, but to the best of my knowledge — I am not sure whether one can determine precisely whether it's accurate or not. *I certainly didn't establish that it's accurate.*" (N.T. 4092-4093) (emphasis supplied).

The confusion with regard to that particular figure was merely symptomatic of the general confusion and ill-preparedness of the witness, which was admitted by plaintiff's attorney in his closing argument to the jury:

> Dr. Kuehn I think was poorly prepared to defend that basic computation that he gave you. It took him too long and he should have been better prepared. (N.T. 4197).

While recognizing the importance of expert testimony in antitrust proof of damages, 16 A.L.R. Fed. 14, 22 (1973),[24] and the fact that Dr. Kuehn qualified as one competent to offer an opinion in such matters, we determine that the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict in this case. *See, Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) ("The leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take.").

Of the methods for calculating plaintiff's damages, we have already considered Method F that relied upon the estimates of Joseph Bonjorno. Method C, that projected Columbia's sales based upon government figures on new housing starts and new highway construction, was completely repudiated by the testimony of plaintiff's

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24. "Measure and Elements of Damages Under 15 USCS §15 Entitling Person Injured in His Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages."

expert. Dr. Kuehn could not explain the relevance, if any existed, of these figures to Columbia's business or to its losses:

"Q. And the Federal Government publishes statistics on new highway construction?

A. Data are published on both, yes.

Q. On both what?

A. Highway construction and housing.

Q. Now, the highway construction, that's new highways, isn't it?

A. That's correct.

Q. That does not include reconstruction, maintenance or repair, does it?

A. That's correct.

Q. And the housing starts are new housing starts?

A. It's based on new housing, yes.

Q. That would not include reconstruction or repair of existing storm sewers, for example?

A. That's correct.

Q. Now, do you know what percentage of Columbia's business was in new highway construction?

A. *I believe very little.*

Q. Most of it was, in fact, in reconstruction and maintenance, wasn't it?

A. That's my understanding.

Q. Do you know whether there is any relationship between new highways and the use of culverts?

A. Well, new highways and aluminum culvert?

Q. Any culvert?

A. *I would assume there is some.*

Q. You assumed it?

A. *Yes, because at least most highways I see, you know, there tends to be some culverts.*

Q. And that's what you based your estimation of damages on, your assumptions, that when you go along the highway you see some culverts along the road?

A. I used this method as the first of four methods since certain data were here I certainly didn't think it was perfect.

I thought it might be related, but that is precisely why in my explanation of which of the various methods I preferred *I listed this as probably the poorest of the four methods.*

I don't consider this necessarily a very good index." (N.T. 4050-4051) (emphasis supplied).

The remaining two methods, utilizing Kaiser nationwide sales (Method D) and Kaiser New Castle sales (Method E), were never adequately explained to the jury. (N.T. 4018-4019).

Although the "yardstick" measure of an antitrust claimant's lost profits, under which the claimant recovers the difference between his net profits during the damage period and the net profits earned in a comparable business unaffected by antitrust violations, is a valid method of estimating damages, 16 A.L.R. Fed. 14, 45 (1973), in this instance the evidence presented was insufficient to establish that the entities used were truly comparable or that the estimates were adjusted to reflect the differences between the businesses compared. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251

(1946); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, *affirmed*, 164 F.2d 1021 (3d Cir. 1946).

Lapses of this nature are frequent in Dr. Kuehn's testimony. Kuehn never could explain how the comparisons in Methods D and E were made in view of the fact that Columbia operated on a fiscal year and Kaiser operated on a calendar year. (N.T. 4057-4068). Kuehn maintained that the calendar year/fiscal year problem would make little difference, however he admitted that he had never calculated it to so determine. (N.T. 4089). Kuehn relied upon the 17.5% normal mark-up of former Columbia salesman, Robert Kennedy, in order to calculate Kaiser's average selling price per pound; however, this figure was not of record in the testimony on damages or liability. Kuehn had difficulty explaining why his calculation of damages for cost of goods sold included a variable cost equal to 11.17% of sales. (N.T. 4108-4109), why an interest expense factor of 7.5% was utilized, and how such interest rate was calculated. (N.T. 4111).

Although Dr. Kuehn's confusion is apparent from a reading of the transcript (N.T. 4003-4150), a reading does not make plain the great difficulty this witness had in responding to questions. On numerous occasions, Dr. Kuehn was unable to answer an inquiry without referring to documents, was unable to find the appropriate figure within the relevant document, and when a figure was located unable to state how it was calculated or why it was used. All of this shuffling of paper and accompanying long silences occurred before the jury. At one point it was necessary to call a luncheon recess in order to give Dr. Kuehn sufficient time to answer a question posed upon cross-examination. The total effect was that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained.

We also recognize that a flexible standard of proof applies where the defendant's wrong doing, here the de-

struction of plaintiff's business, had made it impossible, as a practical matter, for the plaintiff to produce a more precise figure, *see, Bigelow, supra* at 262-266, but in this case the brief trial on damages seemed almost an afterthought following the extended trial on liability. Plaintiff's action was originally instituted in 1974. The delay occasioned by the directed verdict for defendants at the end of the plaintiff's case at the first trial and the subsequent appeal prior to the instant trial on remand may be responsible for some of the deficiency in proof. It seemed obvious to the court that plaintiff's expert, a well-qualified and experienced witness, must have understood the basis for his conclusions when they were initially stated. However, on the witness stand as of the date of this trial, Dr. Kuehn was unable to explain, at least in an unconfused manner, the derivation of his figures or their basis in fact notwithstanding the time provided to him by the court for this purpose. Whatever the reasons for this inability, the trial court is convinced that the jury verdict could only be a product of confusion and speculation.

Mindful of the delay that has occurred since the limited remand, and the economic loss occasioned to plaintiff thereby in the erosion of the money judgment due to the difference between legal interest and the market rate, we are reluctant to incur even further delay and have considered whether the delay itself is a reason not to disturb the verdict of the jury. We also gave serious consideration to ordering a remittitur, an action within the trial court's discretion where a jury awards an amount the court deems excessive. 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[2] at p. 115-70 (1978); however, no reasoned basis could be found for setting an appropriate figure. The deficiency in plaintiff's proof of damages convinces the court that the verdict as to damages should not stand.

Where there is no substantial indication that liability and damage issues are inextricably interwoven or that

the jury verdict was the result of compromise of liability and damage questions, a second trial on the damages alone is proper. *See, Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970); *Darbrow v. Brown*, 255 F.2d 610 (3d Cir. 1958); 11 Wright and Miller, Federal Practice and Procedure §2814 (1973). In this bifurcated trial, it is clear there was no compromise of liability and damage questions. The separateness of the trials is also substantial indication that liability and damage issues are not inextricably interwoven. The court has also considered whether hearing the evidence on liability is necessary to persuade the jury to award damages in an adequate amount and is convinced that the case on liability can be stated to the jury with the facts and inferences most favorable to plaintiff, consistent with the verdict in its favor. Both the plaintiff and defendants will benefit from this opportunity to present damage testimony to the jury in a clear and unconfusing fashion. In any event, fairness to the defendant requires no less.

For the above reasons a new trial as to damages only is granted. An appropriate Order accompanies this Memorandum.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes X No__

   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes X No__

2. (a) Do you find from the evidence that the relevant product market was: [CHECK ONE ONLY]

   (i) aluminum culvert and drainage pipe? X

   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? ____

(iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? _____

(b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:

(a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminim culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained?
or Yes X No__

(b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market?
or Yes X No__

(c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes X No__

4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes X No__

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

/s/ FLORA EIKENKOETTER
Foreperson

Date: 8/16/79

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount; or "None" in the following blank according to your finding. $ 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount; or "None" in the following blank according to your finding. $1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 1, 1977?

   State such amount; or "None" in the following blank according to your finding. $ 710,000

/s/ FLORA EIKENKOETTER
Foreperson

Date: 8/21/79
5:30 p.m.

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of June, 1981, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. Plaintiff's Motion for Leave to File a Supplemental Brief is GRANTED.

2. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $57,000 in response to Interrogatory One as to damages and otherwise DENIED.

3. The Motion of defendants for a New Trial is GRANTED as to damages only.

4. A pre-trial/status conference will be held on *July 17, 1981* at *1:00 p.m.* to consider preparation of a case

stated on liability and any other further proceedings, including a special listing for trial, provided the Court of Appeals does not grant the pending motion to revoke the limited remand.

BY THE COURT:

NORMA L. SHAPIRO
J.

APPENDIX E

Memorandum and Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, *J.* JANUARY 17, 1983

INTRODUCTION

Before the court are post-trial motions arising out of a retrial on damages only in this antitrust litigation. Following the entry of judgment for plaintiffs on the jury's answers to four special interrogatories in the trebled amount of $9,567,939, defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial on both liability and damages.

Plaintiff Columbia Metal Culvert Co., Inc. ("Columbia"), a liquidated corporation (interest in this litigation has been assigned to the present plaintiffs, its former shareholders), originally brought an action against KACC and KACSI, former Columbia salesman Robert A. Kennedy and his company, Kennedy Culvert and Supply, in which it alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §14. A detailed description of the specific actions complained of and the procedural history of this case is contained in the Memorandum accompanying the Order of June 17, 1981 published at 518 F. Supp. 102 (E.D.Pa. 1981).

At the first trial before The Hon. Edward N. Cahn, judgment in favor of defendants was entered on defendants' motion for a directed verdict at the close of Columbia's evidence on the grounds that Columbia, formerly a manufacturer and distributor of aluminum culvert pipe, had not established a *prima facie* case of conspiracy in restraint of trade between KACC and KACSI or between either and Kennedy, proved that Kaiser had monopoly power in the relevant product market, or established a *prima facie* violation of Section 3 of the Clayton Act. The Third Circuit affirmed the grant of a directed verdict as to Kennedy but reversed as to KACC and KACSI, except on the Clayton Act count. Sufficient evidence was presented to allow a jury to decide the relevant product market, whether KACC/KACSI had monopolized or attempted to monopolize that market, and whether KACC and KACSI conspired in violation of Sections 1 and 2 of the Sherman Act.

On remand and transfer to the docket of this court, there was a bifurcated trial by jury. The jury found on answers to special interrogatories that the relevant product market was aluminum culvert and drainage pipe, that KACC and KACSI had monopolized and attempted to monopolize the relevant product market, that KACC and KACSI had conspired in violation of Sections 1 and

2 of the Sherman Act, and that Columbia had been injured by the unlawful acts of KACC and KACSI. Damages awarded in the amount of $1,815,000 were trebled and judgment entered in favor of plaintiffs for $5,445,000. Following a direct appeal (because defendants post-trial motions were untimely filed), the case was remanded to this court by the Court of Appeals for disposition of Kaiser's motions for a judgment notwithstanding the verdict or in the alternative for a new trial.

We denied Kaiser's motions for judgment notwithstanding the verdict or a new trial as to liability because the evidence at retrial was not substantially different from that previously held adequate by the Court of Appeals; the jury's determination was not so against the weight of the evidence as to shock the conscience of the court. 518 F. Supp. at 102. However, judgment notwithstanding the verdict was granted as to the first interrogatory on damages (awarding defendants $57,000 for Columbia's increased usage of aluminum coil in 1971-73). *Id.* at 114. A new trial was granted on the second and third interrogatories, awarding $1,048,000 in lost profits from 1973 to May 31, 1977 and $710,000 for loss of going concern value thereafter.

Plaintiffs had presented only two damages witnesses, plaintiff Bonjorno himself and an expert, Dr. Alfred Kuehn. The record was found insufficient to establish the requisite factual basis to allow the jury to make a rational determination of the accuracy of Bonjorno's testimony. *Id.* at 115. Dr. Kuehn's testimony was found confused and confusing. "The total effect is that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained." *Id.* at 118. In sum, plaintiffs' evidence created a speculative verdict on damages. *Id.* at 117. Because the damages and liability issues were not inextricably interwoven, and there was no indication that the jury verdict was the result of compro-

mise on the liability and damage questions, retrial on damages only was ordered. *Id.* at 119.

The parties were requested to state their positions on procedure for a fair retrial on damages. Defendants had conceded at the argument on post-trial motions following the first trial that the court had the power to retry on damages only, but after the new trial on damages was granted, defendants argued that it would violate their constitutional right to trial by jury. However, counsel for defendants actively participated in discussions on the damage trial procedure.

At the outset of the damage trial, the court informed the jury of their duties. Because a jury in an antitrust matter must award only those damages that flow from the antitrust injury, *see*, 518 F. Supp. at 109, the opening statement was designed to acquaint the jurors with the nature of the antitrust violations that had been found. The jurors were told the parties, the businesses they were or are engaged in, the product and geographic markets involved, the antitrust laws the prior jury had found violated, the purpose of those laws, and the types of liability evidence presented at the prior trial. Finally, the liability interrogatories and answers of the prior jury (518 F. Supp. at 119, App. A) were read to the damage jury. (N.T. 20-25).

Upon the conclusion of this opening statement, counsel for plaintiffs made opening remarks not only on the evidence to be presented by plaintiffs during the retrial but also the liability evidence that had been presented during the prior trial. To provide the jury with an understanding of the activities that gave rise to liability, plaintiffs' counsel was permitted to list the types of activities by KACC and KACSI relied on by plaintiff to establish liability at the first trial: that defendants refused to sell raw materials to Columbia; located a new culvert manufacturing plant within forty miles of Columbia's plant to retaliate against Columbia for buying materials from another supplier; set up Kennedy, the former Co-

lumbia salesman, to compete with Columbia; instituted a "price squeeze," in which Kaiser raised the price of the aluminum needed to fabricate culvert but sold fabricated culvert at a constant price; and induced Columbia to buy a machine suitable for use only with Kaiser products unless modified at significant expense. (N.T. 32-41). Counsel for defendants responded to plaintiffs' statement on liability in his opening remarks. (N.T. 53-56).

The jury, answering four special interrogatories on damages (attached hereto as Appendix A), awarded plaintiffs $728,000 for actual losses, $742,520 for lost profits on the sale of aluminum culvert pipe, $80,000 for lost profits on the sale of flat corrugated aluminum sheet, and $1,638,793 for the diminution in the value of the business. Judgment in the trebled amount of $9,567,939 was entered on this special verdict. Kaiser defendants have again filed post-trial motions. Judgment notwithstanding the verdict is sought on the grounds that: the retrial on damages was improper because the jury was unable to award damages flowing only from the antitrust injury; damages awarded for lost profits duplicated damages for actual losses (Int. 2); the profit projections were unsupported by evidence and artificially enhanced by plaintiffs' use of an improper geographic area and understatement of certain expenses; and the plaintiffs' contentions in the trial on damages contradicted their contentions on the price squeeze in the trial on liability. Defendants also contest the period for which an award of damages on actual losses and lost profits was permitted. Defendants claim that damages awarded for lost profits from the intended sale of flat corrugated sheet (Int. 3) were speculative. Defendants claim also that allowing damages for loss of the value of a going concern (Int. 4) was improper because Columbia did not prove it ever actually terminated business during the damage period. Defendants contend that in any event the damage for loss of going concern value was overstated and was based on assumptions not supported by the evidence.

Defendants move in the alternative for a new trial on the grounds that the retrial on damages only was improper and prejudicial; the conduct of plaintiff's counsel was inflammatory; the court erred in its evidentiary rulings, charge and form of special verdict; and finally that the amount of the verdict was grossly excessive, shocking to the conscience, and the product of jury bias against defendants. Defendants' alternative motion for a new trial on damages only is denied. Defendants' motion for judgment notwithstanding the verdict is denied with regard to damages awarded in response to Interrogatories 1, 2 and 3 and granted as to damages awarded in response to Interrogatory 4. As a result, the jury's award is reduced by $1,638,793 (Int. 4) and the award remaining is in the total amount of $1,550,520. Therefore, when trebled, plaintiffs are entitled to entry of judgment in the amount of $4,651,560.

RETRIAL ON DAMAGES ONLY

KACC and KACSI (hereinafter referred to collectively as "Kaiser") object to the retrial on damages only ordered by the court on June 13, 1981 upon granting in part its motion for new trial. Kaiser contends that because it did not hear the evidence on liability, the damage jury was unable to determine which, if any, of the losses that Columbia suffered were actually caused by the antitrust violation. That such causation was required is clear. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type . . . that flows from that which makes defendants' acts unlawful. . . ."). However, the retrial procedure utilized did not in and of itself preclude rational jury determination of damages caused by the antitrust violations found by the previous jury.[1]

---

1. In his opening statement, Kaiser's counsel "assured" the jury that Kaiser did not violate the antitrust laws or "any other law"

The Third Circuit has expressly approved the use of a retrial on antitrust damages in *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); other cases in the Third Circuit are collected in plaintiffs' brief at Appendix C.[2] In that case the Court of Appeals found legal error in plaintiff's calculations of damages and remanded to the district court for a new trial on damages only. 531 F.2d at 107-09. We cannot presume that the Court of Appeals ordered a procedure that was *per se* violative of the rights of antitrust defendants. *Pueblo, supra* was decided after *Pitchford, supra*, but it was not the first case to hold that damages must be caused by defendant's antitrust violations and it may be assumed that the Court of Appeals was cognizant of a causation requirement when *Pitchford* was decided. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), for example, decided years before the remand for a damage trial in *Pitchford*, referred explicitly to the "necessary causal relation between the [violator's] conduct and the claimed damages. . . ." *Zenith, supra* at 125.

Defendants never requested that special interrogatories as to the alleged anticompetitive acts complained

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NOTES *(Continued)*

notwithstanding the prior jury's determination of liability. (N.T. 52). Kaiser continues to object to the prior jury's determination of liability. Indeed, Kaiser seemed to protest the very mention of the previous liability verdict to the damage jury. (Defendants' Brief at 22). Of course, informing the damage jury of the prior determination of liability was a necessary first step in a retrial on damages to ensure that the damages, if any were found, flow from the antitrust violations. The court made strenuous, although not altogether successful, efforts to limit reference to the issues resolved at the liability phase to the bare minimum required for the jury to understand and determine the damage issues. (Defendants' Brief 18-60; Plaintiffs' Brief, 26-54).

2. It has only recently been reported that the Court of Appeals for the Seventh Circuit has awarded a new trial on damages only in the MCI-AT&T antitrust litigation. *Philadelphia Inquirer*, January 13, 1983.

of by plaintiffs be submitted to the liability jury. (Defendants' Brief at 14-15, 23-24). Kaiser claims that the damage jury could not know which of the five alleged anticompetitive practices complained of by plaintiffs were actually relied upon by the jury that found it liable. But plaintiffs' economist did not attempt to and did not have to distinguish between actual losses caused by the various types of anticompetitive practices. Whether plaintiffs' losses were caused by one or more of the anticompetitive acts was immaterial on the damages issue so long as the jury was presented with competent evidence to prove the extent of plaintiffs' losses caused by Kaiser's impairment of the free and open market in aluminum culvert pipe. Plaintiffs' evidence was so directed. (*See, e.g.*, N.T. 509, 542, 548, 596). The charge to the jury made clear that the jury could only award damages for injury caused by Kaiser's conduct in the market:

> You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.
>
> Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum shortage, a lack of price protection for long-term requirement contracts.
>
> You may also consider whether or not plaintiffs' calculations should have taken into account poor business judgment or poor management. Some corporations suffer losses solely because of their own inadequate financial capitalization. You can't award plaintiffs damages for all its losses if you find that

> Columbia was under capitalized, that is that there was a lack of sufficient working capital and that losses were suffered as a result of that, because under such circumstances Columbia's financial inadequacies rather than Kaiser's conduct would have caused some portion of the losses.

(N.T. 1531-32).

Even if there were a serious question raised as to the propriety of a new trial on damages only, defendants waived objection to this procedure. Before issuing the June 17, 1981 Order granting the retrial, defendants spoke in favor of the concept. Addressing the court's question during supplemental oral argument on the post-trial motions on December 29, 1980, counsel for Kaiser stated:

> . . . With respect to the grant of a new trial with respect to damages alone, obviously, in our submission, the cases would support that kind of remedy.
>
> As to the mechanics upon the new trial, it seems to me, Your Honor, that there would, of necessity, simply be more to the trial than a review of the charts, testimony of Dr. Kuehn, or whomever the plaintiff wished to put on as a fact witness or expert witness. It seems to me there are additional matters relevant to damages and the amount of damages which also go to questions of causation. Those, as we have addressed in our post-trial briefs, deal with conditions in the marketplace that may have impacted upon Columbia's volume of sales, and hence on the amount of profit that it would have earned even assuming the existence of violations of the antitrust laws by Kaiser which also impacted upon Columbia.
>
> . . .
>
> With respect to liability, I believe that it would be sufficient to inform the jury that a verdict on liability has been established; that a jury has found that that

> violation of the antitrust laws caused some damage to Columbia, and it would be up to the jury to determine what the extent and amount of that damage was, and I believe that a trial could occur.

Docket Entry No. 510, N.T. 406. Defendants, having supported a new trial on damages before the jury's award at such trial was known, should not be permitted to object to the procedure itself just because its outcome is not to their liking.

But even if defendants are correct that a limited retrial on the issue of the amount of damages was so prejudicial to Kaiser as to constitute reversible error, the remedy can certainly not be a judgment notwithstanding the verdict in favor of defendants; at most defendants are entitled to a retrial on both liability and damages. That remedy does not lie with this court at this time. Following a bifurcated trial on liability and damages on remand from the Court of Appeals, this court denied a motion for a judgment notwithstanding the verdit on liability; judgment notwithstanding the verdict was granted as to one item of damages in the amount of $157,000 and a new trial granted as to the award of damages for lost profits ($1,048,000) and destruction of Columbia as a going concern ($710,000). But, that new trial was as to damages only for the reasons stated in the court's Opinion of June 18, 1981. At this juncture, the power of this court is limited to granting a new trial again on damages only. This was called to the attention of counsel frequently in the course of the trial in trying to assure fair procedures and prevent yet another retrial. (N.T. 97-99; 976-978). Therefore, the court concludes that defendants' objections to a limited retrial on damages are only to preserve them for the Court of Appeals which, of course, has the power to order a new trial on liability and/or damages.

JUDGMENT NOTWITHSTANDING THE VERDICT

The standard in this Circuit for the entry of judgment notwithstanding the verdict is clear. The court must interpret the evidence in the light most favorable to the verdict winner, and may grant the motion only if that evidence and the reasonable inferences to be drawn therefrom fail to support the verdict as a matter of law. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970). *See also, Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1098-99 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Kademenos v. Equitable Life Assurance Society*, 513 F.2d 1073, 1074 (3d Cir. 1975); 6A *Moore's Federal Practice* §59.08[5] at 59-152 (1979). A directed verdict may be entered on only one or a combination of jury findings if a special verdict has been returned in accordance with Fed.R.Civ.P. 49(a). *See, Franklin Music Co. v. American Broadcasting Cos., Inc., et al.*, 616 F.2d 528 (3d Cir. 1979); *Fox v. Kane-Miller Corp.*, 398 F. Supp. 609, 649 (D.Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976).

Defendants concede this standard but contend that the court should enter judgment n.o.v. because the verdict is contrary to the evidence and unsupported in the record; that is, there is but one reasonable conclusion as to the proper judgment. Defendants argue this persuasively and well. Defendants' brief makes an excellent closing speech to the jury; the problem is that the jury heard it and nonetheless decided for plaintiffs. With the exception of damages for loss of value of a going concern discussed below, there is no error of law during the trial or in the court's charge to the jury on damages (N.T. 554) that would justify setting aside that verdict. The charge was fair and clear although relatively brief because it commented little on the evidence argued in detail by able counsel for both sides. But it touched on and

left to the jury all but one of the matters of which defendants now complain in asserting a right to judgment notwithstanding the verdict.

The Supreme Court stated in *Zenith, supra*:

> Trial and appellate courts alike must also observe the practical limits of the burden of proof, which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

395 U.S. at 123. Accordingly, in an antitrust case, damages need not be proven with exactness or precision; rather, "the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). The court does not have the prerogative of drawing inferences from facts within the exclusive province of the jury that are contrary to its findings without usurping the functions of the jury as a fact finding body. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). It was for the jury to determine the weight of the evidence and the credit to be given the witnesses, expert or otherwise; it has given its verdict accordingly. To set this verdict aside except for clear error of law would impermissibly intrude on the role of the jury in an antitrust trial.

DUPLICATION OF ACTUAL LOSSES AND LOST PROFITS

Kaiser contends that the award for hypothetical lost profits (Int. 2) duplicates the award for actual losses (Int. 1). Kaiser argues that these two types of losses are "irreconcilably contradictory and mutually exclusive." (Defendants' Brief at 64). *See, William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, 105 (E.D.Pa. 1946)

aff'd, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948). In *William Goldman Theatres*, the plaintiff was unable to obtain first-run movies for his leased theater because of defendants' conspiracy to restrain trade. 150 F.2d 738, 742 (3d Cir. 1945). The district court declined to award out-of-pocket expenses actually incurred by plaintiff in connection with an alternative use of the premises in addition to the lost profits from the hypothetical operation of the business from which plaintiff was excluded by defendant's conduct. 69 F. Supp. at 105. Plaintiff's actual losses from the ineffective effort to mitigate damages were not causally connected with the losses from the intended use for which antitrust damages were awarded. *See*, 69 F. Supp. at 105.

However, Columbia was in business throughout the damage period as a culvert fabricator and distributor. To the extent it would have made profits in a free and open market, the antitrust laws provide compensation. Columbia incurred actual losses while running the business it contended it would have operated profitably but for the illegal conduct of the defendants. Plaintiffs' damages would have been reduced had Columbia actually made a profit during the damages period, and so plaintiffs may recover the net losses that were actually incurred in addition to the profits they would have made. Had Columbia made a profit, that sum would have been subtracted from hypothetical lost profits to arrive at the true measure of harm to Columbia. *Pitchford, supra* at 109. But plaintiffs suffered a loss rather than a profit and are entitled to subtract this negative figure from the hypothetical lost profits proved. (*See*, N.T. 55-56). The resulting calculation, the addition of actual losses to lost profits, is necessary to make plaintiffs whole.

LOST PROFITS ON ALUMINUM CULVERT PIPE

Plaintiffs utilized a market share theory to calculate their hypothetical lost profits during the damage period.

Plaintiffs' expert economist, Dr. Gary Bowman, calculated the amount of aluminum culvert pipe actually sold in the relevant market and then calculated the proportion of sales Columbia would have made absent an an antitrust violation. He sought to establish the number of pounds of culvert Columbia would have sold in a free and open market and multiplied that number by the estimated revenues Columbia would have received per pound. From this estimate of gross revenues he subtracted his estimate of Columbia's total expenses if there had been a free and open market. This type of analysis is proper in a case in which plaintiffs were deprived from competing freely in a particular product and geographic market, and the injured party need not produce the "kind of concrete, detailed proof of injury which is available in other contexts." *Zenith, supra* at 116, 123-35.

An expert opinion on relevant damages issues is not enough to satisfy the plaintiffs' burden on damages unless that opinion is based on relevant data and the assumptions behind the opinion are shown to be realistic so that the jury has a rational basis for its decision. *In re IBM Peripheral EDP Devices Antirust Litigation,* 481 F. Supp. 965, 1012, 1020 (N.D.Calif. 1979). Plaintiffs presented expert testimony on all elements of the market share theory, their estimates of the size of the local market at issue, Columbia's share of the local and non-local markets assuming free and open competition, and Columbia's expenses in a free and open market; therefore, the record did not force the jury to engage in impermissible speculation.

Defendants argue that the jury's award of plaintiffs' claims for lost profits must be set aside because plaintiffs' projection of lost profits on the sale of aluminum culvert pipe is based upon assumptions unsupported and contradicted by the evidence in that:

a. the volume of sales in the so-called "local area" are deliberately overstated, contrary to the evidence in the record;

b. plaintiffs' proof on damages improperly deviated from the stipulated relevant geographic market; and

c. plaintiffs' projections of profits on the sale of aluminum culvert pipe were artificially and improperly enhanced by understating certain expenses.

The first step in estimating what a defunct business would have sold in a free and open market was to estimate the overall volume of the market. Plaintiffs' expert chose to use two geographic markets: local and non-local. The local, or "Vineland," selling market was the area covered by the approximately 150-mile radius surrounding Vineland, New Jersey, the location of Columbia's plant. The non-local market was the remainder of the geographic market for which plaintiffs seek damages. Plaintiff's stated rationale for using two markets was that Columbia would have commanded a significantly greater proportion of sales in the local rather than non-local area — 50% rather than 30%.

Thus, if plaintiffs' estimate of the number of pounds sold in the local market was too high because it took into account pounds that were sold in the non-local market, the figure for the total number of pounds of pipe sold by Columbia would be inflated, since the local poundage is multiplied by .5 but the non-local by .3. It is plaintiffs' burden to put into evidence a reasonable and rational estimate of the size of the market. *Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 911-12 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). Where conflicts as to credibility exist as to certain estimates, they are to be resolved by the jury.

Defendant points out that Dr. Bowman used figures for the so-called "local market" that included non-local

sales although Dr. Bowman asserted to the contrary. (N.T. 609). Under cross-examination, Dr. Bowman stated that he obtained his estimate of local market sales by adding sales from Kaiser's New Castle, Delaware plant to Columbia's Vineland sales. This approximately 150-mile local sales area included all of New Jersey, Delaware, most of Maryland, approximately the eastern third of Pennsylvania and very small portions of Virginia, West Virginia, and New York. Ex. D-150 (Map of Eastern United States with 150-mile radius of Vineland delineated). Kaiser introduced uncontradicted deposition testimony that New Castle sales include sales from the entire state of "Virginia, West Virginia, Maryland, Delaware, New Jersey, Pennsylvania." (N.T. 886). Dr. Bowman used an "adjusted territory pounds" figure and then assumed that included only sales within the local area (N.T. 610); Kaiser argues the invalidity of that asssumption. Kaiser's evidence tends to establish that significant sales were made outside the local area that Dr. Bowman considered the local market; Dr. Bowman admitted that if such were the case, his figures would have to be adjusted. (N.T. 611). Kaiser argues that because the jury had no basis upon which to adjust Dr. Bowman's inflated figures, Dr. Bowman's opinion on the total pounds of culvert sold by Columbia permitted the jury to speculate as to the total size of the market.

But Dr. Bowman told the jury he divided the entire market into two shares basically for two reasons: Columbia would have made more sales in an area closer to its plant, and Kaiser data from its New Castle and Schenectady plants was available. The local market focused on Kaiser sales areas and was not strictly speaking an area within a 150-mile radius of Vineland, New Jersey as defendants contended. Since Kaiser was the dominant selling force in the total market, Kaiser sold most of the aluminum culvert pipe, and the Kaiser data provided a natural factual basis for the computation of the market. On plaintiffs' proof of its damages from Kaiser's violation

of antitrust laws, Kaiser does not have standing to complain about its data not providing a precise "geographical fit" to the relevant geographical market in this case.

Q. Why did you pick those two areas? Why did you make that division?

A. Generally speaking the reason for making any division if you divide an overall market area into subareas you get a somewhat more accurate projection. That is the share of the market Columbia would have had in the near areas is bigger than it would have had in the further away area. The reason I chose those two areas is that that is the way Kaiser's statistics were broken down. It was convenient. They had figures for sales to what they called the New Castle area, and they had sales outside of that that I called sort of loosely the non-local area which also may be called the Schenectady area. Since I couldn't breakdown Kaiser's figures any other way and I had Mr. Bonjorno available to tell me how his sales broke down between the two areas as defined by Kaiser it was convenient to use those two breakdowns rather than a breakdown of the overall market into two submarkets.

Q. Once you had decided to make that breakdown, what was the first thing you then did with the data you had available?

A. Once I had the breakdown I wanted to see what kind of market share each of the companies would have had, specifically what market share Columbia would have had over the period '74 through '77.

Q. Did you attempt to determine what volume had actually been sold in each of those areas?

A. Yes, I did. I described that earlier. I'm sorry, that is clearly the first step. You have to know how much was sold in each of the areas over the period.

(N.T. 305-6; Dr. Bowman).

Plaintiffs contend that, even if their estimate of total pounds sold in the local market was inflated by overstatement of the size of that market, Kaiser could have introduced its own data demonstrating the size of the local market. (Plaintiffs' Brief at 69). Defendants chose instead to attack the credibility of plaintiffs' evidence at trial and its adequacy post trial. But once the jury has determined the credibility issues adversely to defendants only the issue of adequacy remains and the standard of proving damages is liberal. *Bigelow*, *supra*. That standard has been met if plaintiffs' expert is to be believed.

To determine the number of pounds of aluminum culvert pipe Columbia would have sold absent Kaiser's antitrust violations, Dr. Bowman multiplied the total poundage that would have been sold by all companies by his estimate of Columbia's share of the local and nonlocal markets. If that estimate had no basis in fact, the resulting calculation had no basis in fact and the jury in considering it would have been speculating in arriving at its verdict on lost profits.

Dr. Bowman determined that in a free and open market Columbia would have almost only Kaiser as a competitor and that Columbia would have obtained 50% of the sales in the local market and 30% of the sales beyond the local market.

Q. Now, why did you select fifty per cent — well, for the three years '75, '76 and '77, why did you use that specific figure [for the local area]?

A. Basically because there were two competitors in the marketplace. Basically was Kaiser and Co-

> lumbia, and basically they were equally situated.
>
> It is true that Columbia was developing its position, but fundamentally regarded them as equally situated competitors, and I think they would have shared the market equally.

(Examination of Dr. Bowman, N.T. 507). The credibility of Dr. Bowman's analysis of the relative strengths of Columbia and Kaiser absent antitrust violations was a question for the jury.

However, Dr. Bowman was obliged to demonstrate that he took other potential competitors into account in concluding that a fully competitive aluminum culvert market would be a duopoly. Under cross-examination Dr. Bowman asserted that he took such other firms into account but considered their influence negligible.[3]

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3. After stating there were two "major" sellers, he was asked about a third company:

Q. So there was a third company. Is it also known as Lane Metal Products?
A. Yes, I had forgotten —
Q. This is a company that is a subsidiary of Bethlehem Steel?
A. Yes, I understand it is.
Q. So you found a third company, Lane, in the local area, selling aluminum pipe in the local area?
A. Yes, that's correct.

* * * * * *

Q. Why didn't you take Lane into account when you were estimating 50 per cent in the local area?
A. Because Lane was only a very small factor in that market, more negligible.
Q. You mean in reality, they were a small factor? You tried to determine how many pounds they sold or something and you determined they didn't sell many pounds?
A. No. They would have been a small factor. I was making projections of what Columbia would have done in free and open competition.
Q. I am talking about Lane, not Columbia.
A. I thought you were asking about Columbia's 50 per cent share of this sub-area, the local area, and that is what I was

At the trial Kaiser vigorously attacked Dr. Bowman's assumption that Columbia could have had 50% of the sales in the local area and 30% of the non-local sales. Defendants' witnesses were allowed to testify about possible competitors of Columbia and the entry into the aluminum culvert market of steel culvert producers. Kaiser's expert contested Columbia's alleged share of the market and testified to the fallacies of Dr. Bowman's analyses. Problems in comparing Kaiser's calendar year figures and Columbia's fiscal year figures were also developed at length. Dr. Bowman placed before the jury a market share estimate of his view of Columbia's position

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attempting to respond to.

Q. What I am trying to determine is did you take into account whether Lane would have any market share in this local market?

A. I took that into account, yes. I considered them as a possibility, certainly.

Q. Well, did you try to estimate what share they would have gotten?

A. I — yes.

Q. What did you come up with?

A. My analysis suggests that the share they would have gotten would have been very small, essentially negligible.

Q. Essentially negligible?

A. Yes.

Q. [N]either Lane nor Columbia in the non-local —local area were much of a factor, yet you gave Columbia 50% of business and you gave Lane one or 2%. Why is that?

A. Because of the position that Columbia was in, with the facilities they had, production facilities, the ability to produce, the kind of equipment they had, the marketing strategy, the product line they offered, the expertise, the kind of connections they had in the business. They were doing fairly well in '73. As a matter of fact, they had 38% of that local area in 1973.

Q. Did you make any analysis —similar analysis of Lane Metal Product as a subsidiary of Bethlehem Steel to see if they had the ability to market in this area under your projections?

A. I didn't do a specific detailed study of Lane, no, I did not.

(Cross-examination of Dr. Bowman, N.T. 613, 614-15, 617).

in an open market. Since it had some support in the evidence, Dr. Bowman's evaluation of the non-local market and his disregard of competitors was for the jury to consider and evaluate.

After Dr. Bowman estimated how much pipe Columbia would have sold in unrestrained local and non-local markets, he multiplied these figures by the estimated selling price for each pound of pipe to ascertain Columbia's gross revenues. The next and final step in estimating the lost profits was to deduct Columbia's estimated expenses in a market free of Kaiser's antitrust violations.

Defendants contend several aspects of Bowman's projected expenses are unrealistically low. But to the extent Dr. Bowman's estimates were supported by some evidence on the record, we cannot state that the jury had no basis upon which to base its evaluation. Dr. Bowman arrived at a figure for Columbia's hypothetical interest expense that was quite low. The actual rate at which Columbia was able to borrow during the damage period was 3.75% above the prime rate. This money was obtained from Columbia's sole banking lender, the Philadelphia National Bank. Dr. Bowman found the average prime rate during the damage period to be approximately 8% (N.T. 559). Instead of using the average percentage of 11.75% — prime plus 3.75% — for Columbia's borrowing costs, Dr. Bowman estimated that in a free and open market Columbia's interest rate would have been 9.5%, the 1975 BAA bond rate. (N.T. 559).

Dr. Bowman admitted that companies of Columbia's size "would not generally borrow with bonds; that is, they tend to borrow directly from a bank instead of a bond." (N.T. 559). But there was testimony from the PNB bank officer for the Columbia account, that had Columbia not been injured by Kaiser's anticompetitive acts it would have been able to borrow funds more cheaply (N.T. 1310); the jury was informed that this bank would recover its unpaid loans (in excess of $320,000) from any

award to plaintiffs. But the basis for Dr. Bowman's hypothetical interest rate was not "thin air." *In re IBM, supra* at 1019. There is no justification for entering a judgment notwithstanding the verdict on lost profits on the sale of aluminum culvert pipe.

LOST PROFITS ON CORRUGATED ALUMINUM SHEET

Columbia's business was fabricating culvert pipe. Although it never actually engaged in any other business, plaintiffs contend that Columbia was ready and willing to begin fabricating flat aluminum sheet, the product from which other fabricators make riveted rather than spiral pipe, and would have been able to do so but for Kaiser's antitrust violations. Therefore, plaintiffs sought, and the jury awarded, hypothetical lost profits on the sale of corrugated sheet. There was evidence that production facilities were modified to manufacture corrugated sheet during 1974, and Bonjorno estimated he could have sold 750,000 pounds of corrugated culvert sheet in 1975, 1½ million pounds in 1976, and 2 million pounds in 1977. (N.T. 205).

To allow the award of lost profits for a business that was never actually in operation, the court must first decide whether plaintiffs' entry into such line of business would have been a natural outgrowth of an established business or an expanson into a new market. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 988 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). Relevant considerations include the "history of the expansion and growth patterns of other competitors in the relevant market," whether production facilities have to be varied significantly, and whether "customers for one unit would in all likelihood remain customers for other units." *Id.* Plaintiffs presented no direct evidence that the production of flat sheet was a natural outgrowth of pipe fabrication, but there was some evidence, if be-

lieved, that Columbia would have had other fabricators as sheet customers even though the customers for pipe would be direct users. There was evidence not only that the production facilities could be readily modified but that Columbia had so modified them and was equipped to manufacture and supply corrugated tube sheets after 1974 (N.T. 201-5). Therefore, the production of corrugated sheet could have been a natural outgrowth of Columbia's culvert business.

The court's second step is to determine whether plaintiffs presented sufficient evidence to allow the jury to determine that plaintiffs had an intention to enter the business and were prepared to do so. *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). There is much evidence if credited that plaintiffs had the requisite intention, but the record is not as clear that they were so prepared. The Fifth Circuit has listed four elements of preparedness: (1) the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plantiff; (3) affirmative action by the plaintiff to enter the business; and (4) the background and experience of plaintiff in the prospective business. *Id.*, *quoting Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

Plaintiffs were unable to finance the purchase of the raw material (aluminum coil) needed to manufacture the corrugated sheet. (N.T. 202). Mr. Bonjorno claimed this was because prices of the finished pipe had been so depressed by Kaiser that it was not economically profitable for customers to buy corrugated sheet, make it into riveted pipe and sell it at a competitive price. (N.T. 186, 202). Bonjorno's assertion that the price of finished pipe was depressed by Kaiser was contradicted by other evidence presented by plaintiffs at trial.

Dr. Bowman testified that in a free and open market the selling price of pipe can be broken down as: 65% for

aluminum costs, 25% for other production costs, and 10% for profits (N.T. 537). Taking the cost of aluminum obtained from Alcoa's price lists published during the relevant years (N.T. 538), Dr. Bowman calculated the hypothetical unrestrained selling price of pipe. In Dr. Bowman's words, Kaiser's prices were "substantially the same" as those projected for a free and open market. (N.T. 1480). But the credibility of Bonjorno's explanation for Columbia's inability to enter the corrugated sheet market, whether he might have consummated a contract with Alcoa or sold corrugated sheet to Syracuse Tank, Lane Pipe or others and Columbia's readiness to enter the corrugated sheet business were all for the jury not the judge to assess.

GOING CONCERN VALUE

Defendants argue that plaintiffs cannot recover damages for loss of Columbia's value as a going concern because Columbia had not "terminated its business . . . as a consequence of an antitrust violation by Kaiser." (Defendant's Brief at 105). We agree.

A business that is forced to shut down because of antitrust violations is entitled to damages for loss of going concern value if proved. VonKalinowski, 15 *Antitrust Laws and Trade Regulation* §115.03[4] (1978) (citing cases). This was recognized in our Opinion of June 17, 1981 which rejected an argument that the damages awarded were duplicative. The Opinion recognized that losses for past net profits and reduction in the value of a business are not duplicative absent unique circumstances. Defendants argued that plaintiffs' recovery of lost profits and their receipt of $574,000 from the sale of Columbia's assets to Howmet Aluminum Corporation ("Howmet") necessarily fully compensated them. But the value of the business as a going concern might have exceeded the amount received from Howmet at the time of sale were it not for the anticompetitive conduct of the

defendants. Therefore, an award of damages for loss of value as a going concern was held non-duplicative of actual losses or projected losses from 1974 to 1977 and non-duplicative of the money received from the sale of Columbia's assets ot Howmet, so long as the damage award for going concern value was properly adjusted to reflect only goodwill, that is, the discounted present value of the estimated flow of future earnings.

However, that opinion was based on the erroneous impression that the sale of Columbia's assets to Howmet was in May, 1977 the end of the damage period. At that time we did not have the argument on the correct facts more fully developed on the present record: that Columbia was a going concern in May, 1977. Significant intervening factors interrupted the causal connection between plaintiffs' antitrust violations and the going concern value of Columbia as of December 20, 1978 so that it would have been improper to allow recovery for loss of profits as a going concern on that date. To the extent that we stated plaintiffs were entitled to both the lost past profits as of the time of the sale to Howmet (December 20, 1978) and the loss of value of the business as it would have been absent defendants' violation of law in May of 1977, we were in error because it is now clear that Columbia's business had not been terminated as of that date losses were allowed for its termination or destruction.

For recovery of "going concern" damages as well as any antitrust damages, it is well established that a plaintiff cannot prevail merely by proof that the defendant has violated the antitrust laws. He must prove that the violation had a causal relationship to the particular loss of anticipated revenue, that is, that the particular damage to plaintiff flowed from the conduct of the plaintiff. *Rea v. Ford Motor Company*, 497 F.2d 577 (3rd Cir. 1974), *cert. denied*, 419 U.S. 868 (1979). *See also, Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830, 833 (3rd Cir.), *cert. denied*, 371 U.S. 829 (1962). Going con-

cern damage is designed to compensate for the harm sustained when a business interest is unlawfully terminated as a result of an antitrust violation. Schneider, *Damages for Termination of a Business Interest*, 49 Antitrust L.J. 1295 (1980).

Antitrust cases concerning "going concern" or "goodwill" damages assume destruction, forced sale or other termination of the business as a necessary predicate to recovery. *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980) (termination of office equipment dealership); *Pitchford, supra* (termination of scientific instruments dealership contract); *Albrecht v. Herald Company*, 452 F.2d 124 (8th Cir. 1971) (forced sale of newspaper carrier's route); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) (termination of service station lease and dealer contract); *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963) (cancellation of service station lease and lessee's dealer sales arrangement); *Twentieth Century Fox-Film Corp. v. Brookside Theater Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied* 343 U.S. 942 (1952) (forced sale of 15-year lease on motion picture theater).

The calculation of going concern value is made as of the date the plaintiff's business was terminated or sold as a result of the illegal conduct. *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 455 (3rd Cir. 1977), *cert, denied*, 434 U.S. 1086 (1978); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970). As stated in *Farmington, supra*, "going concern" represents "the value which the business would have had at that time but for [the defendant's] illegal activity." 421 F.2d at 81. Accordingly, not only must there be a sale or cessation of the business but the date must be at the end of the damage period.

Plaintiffs operated their business as a going concern for approximately five months after May 31, 1977,[4] but plaintiffs elected May 31, 1977 as the end of the damage period. A government loan of $600,000 on or about that date permitted Columbia to continue in operation:

> Q. Now you said that the end of the damage period for which you are seeking damages is May — is what, I'm sorry.
>
> A. May 31, 1977.
>
> Q. Why did you pick that as the end of the damage period?
>
> A. It was just about that time or shortly thereafter that we received the proceeds of the EVA [sic EDA] loan, and the metal that the proceeds permitted us to purchase. Had it not been for that loan we would have then had to close our doors once and for all, and we felt that that represented a conservative and fair place to end the damages.

(N.T. 167).

Therefter, plaintiffs, supplied with aluminum by Alcoa, operated their business as a going concern. Plaintiffs sold Columbia on December 20, 1978, over a year after May 31, 1977, the date plaintiffs concede to be the end of the damage period. The proceeds of a loan of $600,000 plaintiffs received from the Economic Development Administration of the United States Department

4. Although Columbia suspended its production, it never ceased doing business altogether prior to May 31, 1977:

> Q. Was Columbia Metal open and in business until at least May 31, 1977?
>
> A. Yes, we were.
>
> Q. Had you ever closed your doors?
>
> A. No, we never had.

(N.T. 150 — Bonjorno).

of Commerce were used in the manufacture of steel and aluminum pipe:

Q. And after it got the $600,000, Columbia went back into operation, did it not?

A. Yes, it did.

Q. And during that time it made aluminum and steel pipe, did it not? . . .

A. We made some small quantity. We tried to make some small quantity of steel pipe, yes.

Q. And you made aluminum pipe?

A. Yes, we did.

Q. What company supplied you with aluminum?

A. Alcoa.

Q. How long was Columbia in operation after it got the $600,000?

A. Approximately five months.

Q. And you stopped production again?

A. Yes.

(N.T. 296-7).

Although the jury could reasonably have used May 31, 1977 as the end of the damage period for purposes of calculating lost profits, it could not as a matter of law apply this date as the commencement of "going concern" damages. May 1977 was not the time of business termination but rather the time of its rejuvenation. By the time Howmet purchased Columbia the following year and began to reoperate as Howmet Columbia (N.T. 756-57), the going concern value of the company was substantially altered by the receipt of the government loan and numerous other market forces during the period of operation and thereafter.

With respect to going concern damages, the loan of substantial government funds in May, 1977 is not simply another factor to be accounted for by the jury in its overall assessment of the amount of damages due. The $600,000 EDA loan made it possible for Columbia to continue in operation as a going concern. For although Columbia ceased its production in 1975, it "kept its doors open" and renewed production in 1977 *as a result of the EDA loan*. (N.T. 167-69). A business which is in operation, as was Columbia in May, 1977, cannot receive damages for loss of profits it would have had as a going concern. Loss of going concern value is for a concern no longer going, that is, terminated by liquidation or forced sale.

Plaintiffs filed this action in Janaury, 1974; at trial they chose May, 1977 as the conclusion of the damage period; they foreclosed their ability to recover damages for the time they continued to operate with government financing. The cessation of their operations five months thereafter and sale of the assets of a defunct operation one year after that cannot be attributed to Kaiser on this record. If the jury were to go beyond the damage period to the actual date of sale, charge Kaiser with responsibility for the sale and then assess going concern damages flowing from defendants' activities as of December, 1978, the jury would be forced to rely on prohibited speculations and guesswork.

> If . . . the record discloses that the evidence on which the verdict is based is so critically deficient of proof of an essential fact needed to support the verdict that the jury could only have ventured a guess as to its occurrence, then a judgment notwithstanding the verdict is required.

Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1099 (3rd Cir. 1980) *citing Denneny v. Spegel*, 407 F.2d 443, 442 (3rd Cir. 1969) and *Neville, supra* at 1210 n.5.

The uncontested testimony of the plaintiffs that the EDA loan made possible the continued operation of the business beyond the damage period barred recovery for future loss of profits as a going concern as a matter of law even if the record is viewed in the light most favorable to plaintiffs. Therefore judgment for defendants notwithstanding the verdict will be entered as to the damages awarded in Interrogatory 4. We find it neither necessary nor appropriate to grant a new trial because of this issue. A new trial could not change the result as to these damages; the evidence as to the other items of damages and its consideration by the jury was sufficiently distinct to permit their award even if the damages for loss of going concern value is set aside.

Defendants assert several other grounds for the deficiency of the evidence on going concern value, including that the capitalization of profits should have been on a pre-tax instead of after-tax basis and that the use of a 10% capitalization rate was too high for a company such as Columbia. Defendants argue these points persuasively but upon evidence not offered at trial or the proper subject of judicial notice at this time; without such evidence on the record it is inappropriate for the court to consider it in the context of post-trial motions. In any event, these matters are moot in light of our denial of going concern damages on other grounds.

OTHER GROUNDS FOR JUDGMENT N.O.V.

Three other contentions of defendants in support of judgment in their favor notwithstanding the jury verdict for plaintiffs merit discussion.

Defendants objected to the admission of evidence on lost profits on sales beyond the relevant geographic area as stipulated by the parties.[5] The evidence of non-local

5. The stipulated area extended north through Rhode Island, south through Northern Virginia, and west through eastern Pennsylvania.

sales which was the basis of plaintiffs' projections undeniably extended beyond the geographic area agreed to by the parties for the purpose of determining liability. But it was not agreed to as a limitation on plaintiffs' damage estimates. As long as there was some evidence that Columbia would have made sales beyond that geographic area, as there was, plaintiffs were entitled to have the jury consider those estimated sales. *Pitchford*, *supra* at 108-09.

Defendants contend that whatever the actual losses or lost profits, for all practical purposes, Columbia's business was terminated prior to 1977 so that damages could not in any event be awarded beyond 1975. This issue was vigorously pursued on examination and cross-examination of witnesses for both sides and argued to the jury thereafter. The jury was instructed to award damages only for those years during which it was reasonable for Columbia to have continued to operate its business for purposes other than the claim of damages in suit. (N.T. 1540-41). The jury had an adequate basis upon which to decide the length of time for which damages might be awarded to plaintiff.

Defendants also contend that the judgment should be set aside because plaintiffs' theory of damages and the evidence adduced to support it contradicted the theory of liability based upon a "price squeeze." Among the joint activities of defendants relied on by plaintiffs at the trial on liability was a "price squeeze" by which KACC raised the price of aluminum sheet sold to other fabricators; aluminum sheet was transferred to KACSI at a price that permitted KACSI to sell Kaiser fabricated culvert at a low price with which other fabricators could not complete. That is, the difference between the price of the raw material charged by Kaiser and others, such as Alcoa, presumed to follow its lead, and the price charged for the finished product by Kaiser made it impossible for other companies not vertically integrated to sell the finished product competitively.

In this trial on damages, the calculations of plaintiffs' expert on prices in a free and open market tended to contradict the "price squeeze" theory. The prices he used for raw material (aluminum coil) were the actual prices charged by Alcoa in 1974-77 at which time it allegedly followed the lead of Kaiser. He used these prices to establish a fair selling price in a freely competitive market; those prices were admittedly nearly identical to the average direct selling price actually charged by Kaiser in the damage period. (N.T. 1478-80). Plaintiffs' expert also testified that the relationship between metal cost and the selling price of culvert pipe in a free and open market would have been 65% of sales; Columbia's financial statements for the year 1970 through 1975 showed a raw material cost approximating 65% of sales in each year. Thus, plaintiffs' evidence at the retrial on damages cast some doubt on a "price squeeze" as the basis for liability.

But a "price squeeze" was just one of a number of activities relied upon by plaintiffs at the first trial from which liability might have been found. There was sufficient evidence from which a jury might have inferred that KACSI: attempted to drive Columbia out of business; threatened to place a plant near Columbia if it purchased raw material from other than Kaiser and then later opened a plant in Delaware that had originally been planned for Virginia; charged lower prices from that plant, particularly in southern New Jersey; and extended credit to a former salesman of Columbia against the recommendation of KACSI's credit department. A jury finding on the anticompetitive significance of each of these acts was not requested and no special interrogatories were submitted as to which of the alleged categories of activities violated the Sherman Act or caused antitrust injury to Columbia.

At the first trial plaintiffs estimated damages by using four projection Methods (Methods C, D, E, and F). Method C (P-3012) projected Columbia's sales based upon government figures on new housing starts and new

highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while Method E (P-3014) used Kaiser sales from the New Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendant's wrongdoing. At the time the post-trial motions were decided it did not appear liability and damage issues were inextricably interwoven. The trial on damages and liability had been bifurcated by agreement of the parties, so that there seemed little basis to believe the jury verdict would have been the result of compromise on the liability and damage issues. Because the liability and damage issues seemed sufficiently distinct and severable, a new trial on damages only was deemed fair to both parties and was so ordered. But *cf., Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981) (plaintiffs' failure to prove five of six alleged exclusionary activities and lack of certainty that jury based its verdict exclusively on the one remaining practice required all findings on liability set aside; a partial new trial limited to redetermination of damages held improper unless it clearly appeared the issue to be retried was distinct and separable).

Notwithstanding the vigor with which plaintiffs' urged the unassailability of their damage evidence on their motion for reconsideration (later withdrawn), at the damage retrial plaintiff proffered a different expert and a different method for calculation of Columbia's hypothetical share of a freely competitive market. This new testimony on damages if heard by the liability jury might have influenced it to reject or discount the contention of a "price squeeze" by the Kaiser defendants. But this circumstance certainly does not compel the entry of judgment in defendants' favor notwithstanding the verdict. At most it reflects the unforeseen difficulties arising from a limited retrial on damages. Since the court rules now

only on post-trial motions concerning the retrial on damages, this consideration is for the Court of Appeals.

The court has considered all other arguments for the entry of judgment notwithstanding the verdict and found them to be without merit.

MOTION FOR NEW TRIAL

When a party moves for judgment notwithstanding the verdict or in the alternative for a new trial, and the court grants judgment notwithstanding the verdict, it is imperative that the court rule on the new trial request so that the litigation will not be needlessly protracted if the judgment is thereafter vacated or reversed by the appellate court. Fed.R.Civ.P. 50(c); 15 Wright & Miller, *Federal Practice and Procedure* §2539 (1971). Defendants advance four grounds for a new trial: that the conduct of plaintiffs' witnesses and counsel was prejudicial and improper; that the verdict was against the weight of the evidence; that the verdict was excessive; and that legal errors were committed throughout the trial.

Plaintiffs' counsel and witnesses during the retrial made some remarks irrelevant to damages issues and prejudicial to Kaiser. Notwithstanding extended discussion with counsel prior to trial and admonitions to counsel during the trial, the findings on liability were overstated or referred to unnecessarily. The testimony of plaintiffs' principal witness conveyed resentment of Kaiser which was not surprising. It seems that a trial limited to damages presented difficulties to counsel for both parties. But these were lapses from perfection in the course of lengthy, complex and vigorously contested proceedings. After reviewing the record as a whole and the instructions to the jury to consider only the issues on damages without prejudice or bias, we are of the opinion that the conduct of plaintiffs' counsel and witnesses does not warrant a new trial on damages.

A new trial may be granted on the ground that the verdict is against the weight of the evidence. *Neville, supra;* 6A *Moore's Federal Practice* ¶59.08[5] (1982). In terms of the amount of damages awarded, a new trial may be granted when the damages assessed by the jury are "so unreasonable as to offend the conscience of the Court." *Murray v. Fairbanks Morse*, 610 F.2d 149, 152 (3d Cir. 1979). Stated either way, such a motion for a new trial is within the sound discretion of the court. *Id.* at 153. In exercising its discretion, the court may weigh the parties' evidence instead of looking only to whether the verdict winner has introduced sufficient evidence on each essential element to preclude judgment as a matter of law. *Moore's Federal Practice, supra.* Greater scrutiny of a verdict is called for when the trial is "complicated and deals with a subject matter not lying within the ordinary knowledge of jurors." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960).

Even on a motion for a new trial judicial discretion must be exercised in a manner consistent with plaintiff's right to a trial by jury. The court may not substitute its own judgment for that of the jury merely because the judge as the finder of fact might have reached a different conclusion. That well established principle is not obviated simply because the trial is bifurcated.

> (N)either a trial nor an appellate court has the authority to substitute its judgment for that of the jury and thus usurp the jury's function as the principal finder of fact.

Collins v. Signetics Corp., 605 F.2d 110, 115 (3d Cir. 1979).

At the prior trial this court was guided by that principle. Based on the law of the case determined by the Court of Appeals, it found that evidence sufficient to support the jury's conclusion that defendants monopolized or attempted to monopolize the relevant product market in violation of Section 2 of the Sherman Act. The jury's

determination on liability was not so against the weight of the evidence as to shock the conscience of the court. But the deficiency in plaintiffs' proof of damages convinced the court that the verdict as to damages should not stand. The evidence presented by the damage witnesses was incomplete, confusing and lacking in probative value and the factual basis for the estimates of losses was not made clear by the testimony. Since the damage award on that inadequate record had to be vacated, no explicit statement as to excessiveness was deemed necessary to the decision. After a retrial on damages at which plaintiff offered a different expert on damages and a new theory of the measure of damages or at least a new way of calculating damages, the court is faced with a difficult question: if plaintiff could not substantiate an untrebled award of $1,815,000 at the first trial on damages, what is the effect of an untrebled award of $3,189,313 at this trial?

The record on retrial was different and more fully developed. The evidence was sharply in conflict; the issues were pointedly raised by the direct testimony and extensive cross-examination. Almost all of Bonjorno's statements on the financial history of his company, the state of the market for the years in question, his future intentions and the prospects of Columbia required credibility determinations. The implausibility of deeming Columbia an operating business between 1975 and 1977 was effectively raised. The witnesses on behalf of plaintiffs were subject to impeachment for lack of knowledge, prejudice against Kaiser or interest in the outcome of the case. The assumptions of plaintiffs' expert on the size of the market, Columbia's projected 50% share of a local market and 30% of the entire market were challenged as ignoring viable competitors, inflating revenues and deflating expenses. But all of this was placed before the jury by a fair charge; its role as factfinder in weighing the contradictory evidence and inferences and in drawing the ultimate conclusions as to the facts cannot properly

be ignored. Whether the trial judge would reach the same conclusions is irrelevant. So long as evidentiary support for their jury findings exists, "we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Therefore the court must refuse to set aside this verdict as excessive and respect the role of the jury in judging the credibility of the witnesses, assessing the weight given to expert opinions and resolving conflicting evidence.

Two judges have previously taken these questions from a jury. At the initial trial, a verdict was directed for defendants at the end of the plaintiffs' case on the ground that the evidence was insufficient to establish a market composed of aluminum culvert pipe or a monopolization of the relevant culvert pipe market and there was insufficient evidence of conspiracy in restraint of trade. The Court of Appeals reversed and remanded for trial. Following that trial, judgment on the verdict in favor of plaintiffs on liability and damages was set aside and a new trial ordered on damages only. Now this court is requested to set aside a second award of damages by another jury.

"Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party." *Louisville & Nashville Railroad Co. v. Woodson*, 134 U.S. 614, 623 (1980). Wright and Miller, commenting on this dictum in *Federal Practice and Procedure*, Vol. 11 §2803 at p. 35, observes:

> Of course there is no question but that a third trial may be ordered when the second trial, like the first, has been marred by a legal error. The more difficult question is whether the trial court may set aside successive verdicts as excessive, or against the weight of the evidence. That the power to do so exists seems perfectly clear, but it is equally clear that it is a power

> to be exercised only in the most exceptional cases. When two juries have reached substantially the same result, the possibility of a miscarriage of justice is very slight. [Footnotes omitted].

The usual circumstances weighing against the exercise of discretion in ordering a third trial on damages were well expressed by the trial judge in *Frank v. Atlantic Greyhound Corp.*, 177 F. Supp. 922 (D.D.C. 1959), *aff'd*, 380 F.2d 628 (D.C. Cir. 1970):

> When a new trial is granted on the ground that the verdict is contrary to the weight of evidence, or on the ground that the damages awarded by the jury are excessive or inadequate, the trial judge takes this action to prevent what he finds to be a miscarriage of justice. This step is taken only in exceptional cases, as great weight must ordinarily be accorded to the verdict of a jury. If a second jury arrives at the same result as did the first, the trial judge may well pause before setting aside the second verdict. Under such circumstances the parties have had two trials. The fact that two juries in effect agreed is entitled to a great deal of significance. Bearing in mind that a motion to set aside a verdict of a jury on the facts should be sparingly granted under any circumstances, *a fortiori* a second verdict reaching substantially the same result on practically the same evidence should greatly increase the hesitancy of the Court to award another trial. The possibility that a miscarriage of justice has resulted is greatly diminished under such circumstances. After all, there must be some point at which the granting of new trials in the same case should ordinarily stop. It may well be that if another new trial were granted, the same result would again be reached by a third jury.

177 F. Supp. at 923.

Here these circumstances are not present. The first new trial on damages was granted because there was a lack of an evidentiary basis for expert estimates not just because the verdict was against the weight of the evidence. Moreover, on retrial plaintiffs (perhaps because of the inadequate testimony of their previous damage expert), presented not only a different expert but a different theory of damages or at least a far different method for its calculation. So there has not been a second verdict reaching the same result on practically the same evidence.

But a trial judge should still pause before setting aside this second verdict because of the peculiar procedural posture of this case. The court's discretionary grant of a new trial is now limited to retrial on damages only. Defendants strenuously object to the fairness of this procedure (Defendants' Brief, pp. 18-60) and have preserved for appeal their argument that in practice if not in theory it was prejudicial error. It may be that if another new trial on damages were granted, the same result might again be reached by a third jury but would again be subject to the same objections, reviewable only on appeal. This court's determinations on liability will also be reviewed when this matter is again considered by the Court of Appeals. There may be no retrial at all but if there is to be a one, guidance from the Court of Appeals on the determination of the liability issues and the scope of the retrial is in the interests of the administration of justice and the need of the parties for the final termination of this litigation.

For the above reasons, a new trial as to damages is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia? None__ $ 728,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe? None__ $ 742,520

3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet? None__ $ 80,000

4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business? None__ $1,638,793

WILLIAM H. WHITTINGTON
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL WHEN DELIBERATIONS HAVE BEEN COMPLETED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $1,638,793 in response to Interrogatory Four as to damages and otherwise DENIED.

2. The alternative Motion of defendants for a New Trial is DENIED.

3. Judgment will be entered on the verdict of the Jury as follows:

Actual Losses	$ 728,000
Lost Profits (Pipe)	742,520
Lost Profits (Sheet)	80,000
	$1,550,520
Trebled According to Law	X 3
	$4,651,560

NORMA L. SHAPIRO

J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-1846

COLUMBIA METAL CULVERT COMPANY, INC.,
Appellant

v.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY and KENNEDY CULVERT
& SUPPLY COMPANY, and
ROBERT KENNEDY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
C. A. No. 74-122

Argued February 22, 1978

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*, and MARKEY, **Chief Judge of the Court of Customs and Patent Appeals.*

Michael M. Baylson, Esq.
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Attorney for Appellant

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William H. Roberts
Samuel R. Simon
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Attorneys for Appellees, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.

ADAMS, *Circuit Judge*

*Sitting by designation.

C. Clark Hodgson, Jr.
Lee A. Rosengard
Stradley, Ronon, Stevens
& Young,
Philadelphia, Pa. 19102

Attorneys for Appellees Robert A. Kennedy and Kennedy Culvert & Supply Company

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OPINION OF THE COURT
(Filed May 24, 1978)

Antitrust litigation seldom partakes of elegant simplicity. Its elaborations find expression both in the intricacies of finely woven legal theory and in the expansiveness of painstakingly detailed factual submissions. In the face of such complexity, considerable value attaches to efforts by the trial judge to confine the task of the jury to manageable dimensions by the judicious use of directed verdicts. Nonetheless, the Seventh Amendment guarantees a party the right to commit the task of determining facts in civil proceedings to a jury. And the difficulties of deciphering the import of extensive and conflicting evidence may not be allowed to disturb the exercise of that right.

In the matter before us, the resolution of charges of antitrust violations in the market for aluminum culvert pipe turns on disputed factual issues of conspiracy, motive, and market definition. The trial judge, however, deemed it appropriate to enter a directed verdict at the close of the plaintiff's case. We are now called upon to determine whether the extensive trial record permitted such an action.

A. Facts

1. *The Parties*

This proceeding arose out of the interaction of five entities: Columbia Metal Culvert Company, Inc. (the plaintiff), Kaiser Aluminum & Sales, Inc. (KACSI), Kaiser Aluminum Chemical Corporation (KACC), Robert Kennedy, and Kennedy Culvert & Supply Company.

The plaintiff in this case originated in 1959, when Joseph Bonjourno founded Columbia Steel, a corporation that was to fabricate metal culvert pipes used in highway construction. Three years later, after some financial difficulties, Columbia was reconstituted as Columbia Metal Culvert, the current plaintiff. Columbia Metal's plant in Vineland, New Jersey, specialized in the manufacture of aluminum culvert pipes, which the company then marketed.

KACC and its wholly owned subsidiary, KACSI, constitute the second alignment in the case. KACC manufactures aluminum sheet and coil, from which aluminum culvert pipe, such as Columbia's product, is constructed; it then conveys these pipes to KACSI, at a "transfer price" which is not necessarily reflective of either costs or market price. KACSI in turn sells the sheet and coil to pipe fabricators such as Columbia. In addition, KACSI fabricates and sells aluminum culvert pipe itself in competition with the fabricators to whom it supplies sheet and coil. KACSI sells 80% of the aluminum culvert pipe in the United States, although only 79% of its pipe output is aluminum (the rest being steel). Neither of the other large aluminum producers manufactures aluminum culvert.

The third set of parties before us is comprised of Kennedy Culvert & Supply Company, a distributor of KACSI culvert pipe in Southern New Jersey, and its owner, Robert Kennedy, a former salesman for Columbia Metal.

2. *Background of Dispute*

In earlier times, the parties had enjoyed a close business relationship. Columbia's decision in 1962 to begin producing aluminum culvert was encouraged by KACC and KACSI, who supplied technical assistance, as well as all of Columbia's raw materials. Columbia was one of the few strictly aluminum culvert manufacturers in the country and KACSI manifested an interest in using Columbia as a spearhead to break into the culvert market — a market which had previously been dominated by steel and concrete products. In these amicable years, Robert Kennedy was one of the most successful of Columbia's salesmen.

The core of Columbia's antitrust claim is that in 1971, when Columbia decided to place some of its aluminum orders with Reynolds Aluminum, KACSI determined to put Columbia out of business in retaliation. After learning of the errant orders, the evidence reveals, KACSI refused to sell aluminum to Columbia.[1] In addition, Columbia alleges that in an act of vengeance for Columbia's infidelity, KACSI decided, with KACC's approval, to locate a new culvert manufacturing plant in New Castle, Delaware, within fifty miles of Columbia's plant in Vineland, New Jersey, despite the fact that KACSI's new production unit had earlier been slated for Virginia. Because of the high cost of transporting culvert, there is evidence that the Delaware location meant that Columbia would become subject to severe new competition from KACSI culvert.

At the same time, Columbia maintains, KACSI conspired with Robert Kennedy, still a Columbia salesman, to set Kennedy up in business as an independent distributor of KACSI products in the Vineland area, and thereby to complete the destruction of Columbia's mar-

1. While the defendants dispute the allegation that KACSI refused to sell to Columbia, there is ample evidence to allow a jury to find that such was KACSI's policy. N.T. 163, 943-44, 2057-59, 2294.

ket. Columbia charges that Kennedy used confidential knowledge he had gained from his work with Columbia to underbid Columbia, and that Kennedy and KACSI conspired to avoid competing with one another.

Finally, Columbia claims that it was the victim of a price squeeze consciously engineered by KACSI and KACC to drive independent fabricators such as Columbia out of business. Sheet and coil were transferred from KACC to KACSI below cost, enabling KACSI to make a "profit" on sales of aluminum pipe at prices too low to be matched by independents who had to buy their sheet and coil at market prices. Simultaneously, it is claimed, KACSI, with KACC's concurrence, contrived to raise the price of raw materials confronting Columbia.

As a result of these maneuvers, Columbia asserts, it was driven out of business.

3. *The Litigation*

In 1974, Columbia brought the present law suit, which charges Kennedy, KACSI, and KACC with violations of §§1 and 2 of the Sherman Act. In addition, the complaint alleges that KACSI is guilty of an infraction of §3 of the Clayton Act by its attempt to insist that Columbia deal exclusively with KACSI for coil and sheet.

After the jury had heard the twelve days of testimony comprising the plaintiff's case, the trial judge directed a verdict for the defendants on all of Columbia's claims. Judge Cahn held:

> 1. The evidence "tended to establish" that the relevant market in the case was not, as Columbia contended, a market for aluminum culvert, of which KACSI controlled 80%, but a market for both steel and aluminum culvert, where KACSI sales represented less than 10%.[2]

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2. Since this was a motion for a directed verdict after the plaintiff's case was completed, we understand that Judge Cahn ascertained that a jury could not have reasonably determined that the market in question consisted solely of aluminum culvert.

2. As a result, KACC/KACSI could not be guilty of monopolization in violation of §2 of the Sherman Act since they possessed no monopoly power in the relevant market.

3. Neither could KACC/KACSI be guilty of attempted monopolization since the limited market position precluded a "dangerous probability of success."

4. KACC, KACSI and Kennedy could not be liable for conspiracy to monopolize, on the ground that insufficient evidence had been adduced for a jury to find either specific intent to monopolize or a conspiracy to monopolize in the relevant product market.

5. A jury could not find KACC and KACSI guilty of a conspiracy or combination in restraint of trade under §1 of the Sherman Act, since not enough evidence had been presented to allow a reasonable inference or conspiracy between KACSI and KACC, and because the market share was too small to allow a finding of restraint of trade.

6. Kennedy and KACSI could not be held liable for conspiracy in restraint of trade because there was inadequate evidence to allow a jury to find a conspiracy between Kennedy and KACSI, a substantial restraint of trade, or an intent to put Columbia out of business.

7. The failure to present evidence on the proper definition of the market for the Clayton Act claim precluded a finding in plaintiff's favor on that issue.

Columbia has appealed each aspect of the directed verdict.

B. Standard of Review

As the trial judge recognized, in evaluating defe

dants' motion for a directed verdict, the question is whether sufficient evidence has been introduced, when viewed in the light most favorable to the plaintiff and allowing all reasonable inferences in its behalf, to allow a jury to find that relief is warranted.[3]

The badinage between the plaintiff and defendants in this case over whether "some" evidence, "substantial" evidence, "any" evidence or a "scintilla" of evidence is necessary in order to defeat a motion for directed verdict impels us to reiterate the Supreme Court's comments of 35 years ago in *Galloway v. United States*:[4]

> Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence" or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.

Where the issues are ones for resolution by the jury, the judge may deprive the jury of its role at trial only where such action is necessary to guard against a verdict founded solely on "mere speculation."

C. The Market

The fulcrum of the district court's opinion was its determination that no jury could reasonably find the relevant market in this case to be composed of any spectrum of products more restricted than "aluminum cul-

3. *See Patzig v. O'Neill*, typescript p. 4-5, (No. 77-1190, 3d Cir. 1978); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n. 6 (1962).

4. 319 U.S. 372, 395 (1943).

vert and steel culvert." This determination reduced the market position of the defendants, as proved at trial, from over 80% of the aluminum market to less than 10% of the aluminum and steel market.[5] Such a reduction in market share allowed the trial judge to proceed to draw the conclusions that the case contains no adequate evidence to allow the jury to find monopolization, dangerous probability of monopolization, or restraint of trade. The correctness of the district judge's market determination, therefore, must frame the analysis of the charges brought by Columbia.

1. *The Mode of Market Definitions*

Well-settled principles govern the delineation of the relevant product market in an antitrust case, even if the outcome of their application to individual fact patterns is often less than obvious.

The "monopoly" condemned by §2 of the Sherman Act[6] inheres in "the power to control prices or exclude

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5. The defendants claim that even if the plaintiff's market definition is accepted, no competent testimony in the record establishes the proportion of aluminum culvert manufactured by KACSI in the agreed upon five state geographical market. Since the unrefuted testimony of Mr. Bonjuorno, who traded extensively in the geographical market, asserts that the KACSI market share is "around 80%," and since that figure accords with KACSI/KACC's admitted 80% share of the aluminum culvert market nationwide, there is sufficient evidence in the record on this point to defeat a motion for directed verdict.

Similarly, while we can find no evidence establishing KACSI's proportion of the steel and aluminum market, both counsel agreed at oral argument that the figure was less than 10%.

6. 15 U.S.C. §2 proscribes the actions of:

> Every person who shall monopolize or attempt to monopolize, or conspire, or conspire with any other person or persons to monopolize any part of trade or commerce among the several states.

competition."[7] To the extent that competition from related products limits the market power of an entity with a dominant position in one product, such an entity is less likely to be found to hold "monopoly" power forbidden by law. This is so for the ongoing competition from other products guards against the ability of the dominant entity to increase prices and makes exclusionary tactics by such a party fruitless, impossible or unbearably expensive. Thus in resolving the proportion of the "market" controlled as a prelude to an examination of the extent of a firm's power to control prices or exclude competition, the courts look to the range of "commodities reasonably interchangeable by consumers for the same purposes."[8]

Similarly, in the context of §1's prohibition of conspiracies in restraint of trade, except where practices fall under a judicially crafted *per se* ban, a finding of illegality presupposes a determination in any given case that the "effect upon competition in the marketplace is substantially adverse."[9] This inquiry, in turn, necessitates an examination of the boundaries of real competition. As the Supreme Court stated in *Times-Picayune Publishing Co. v. United States* "our inquiry to determine reasonableness under §1 must focus on 'the percentage of

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7. *United States v. E. I. duPont & Co.*, 351 U.S. 377, 391 (1956) *quoted in United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

8. *United States v. DuPont*, *supra*, 351 U.S. at 395.

9. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1346 (3d Cir. 1975), *quoting United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 375 (1967). *See Sitkin Smelting & Refining* typescript at 13. (No. 77-1003/4, 3d Cir. 1978). Even in some classes of cases which fall within the "per se" rule market power is relevant to a finding of violation. *See e.g. United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 619-22 (1977) (tying requires market power); *Continental TV Inc. v. GTE Sylvania* 433 U.S. 36, 65-66 (1977) (White, J. concurring).

business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.' "[10]

Therefore, under either §1 or §2 of the Sherman Act, judges must attempt to ascertain the flow of commercial interactions. And in exploring this pattern of competition, courts are adjured to follow the well-trodden trail illuminated by the late Chief Justice Warren in *Brown Shoe Co., Inc. v. United States:*[11]

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10. 345 U.S. 594, 615 (1953). *See id.* at 612 n. 31 ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variation in price, only a limited number of buyers will turn . . .); *Coleman Motor supra, American Motor Inns v. Holiday Inns*, 521 F.2d 1230, 1247 (3d Cir. 1975).

11. 370 U.S. 294, 325 (1962). *Brown Shoe* was a §7 case, but its submarket analysis was adopted in a §2 context in *United States v. Grinnell Corp.* 384 U.S. 563, 572 (1966).

As we have intimated in prior cases, the inquiries into the scope of competition under §1 and §2 are not precisely the same. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347-48, 1349 (3d Cir. 1975) (market definition sufficient for §1, not §2); *Glauser Dodge Co. v. Chrysler Corp.*, No. 76-2390/77-1188 (3d Cir. 1977) slip op. at 17 n. 17, *cert. denied* May 22, 1978 (distinguishing §1 market definition from §2 market). *See Fount Wip v. Reddi Wip Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978) (§1 verdict affirmed, §2 verdict reversed on failure to prove market adequately), *cf. United States v. E. I. DuPont & Co.*, 351 U.S. 377, 395 n. 23 (1956) (distinguishing between monopolization, attempt to monopolize and conspiracy to monopolize with regard to market definition). The §2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. §1, in contrast, is concerned with patterns of competition as a means of judging whether a restraint of trade is unreasonable. Thus, rival products might provide sufficient competition to foreclose a finding of monopolization, yet the degree of insularity of the initial product might allow a finding of illegal restraint of trade in regard to restrictions imposed within that initial market. For instance, stifling intrabrand competition may violate §1, while "monopoly" over a given brand would clearly not run afoul of §2. *See Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36, 52 n. 19, 53, 59 (1977).

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

That path, however, has led to a variety of destinations. It is true, as the defendants here point out, that the Supreme Court in *DuPont*, a §2 controversy, refused to treat "cellophane" as a product market distinct from other flexible wrapping paper.[12] Yet, in subsequent cases, the Court has countenanced the separation of "accredited central station alarm systems" from non-accredited alarms, noncentral station alarms, and watchman services;[13] the distinction between markets for insulated aluminum and insulated copper wire, despite the fact that the same customers bought each for similar purposes;[14] and the differentiation between championship boxing matches and all other boxing matches.[15] Thus, the breadth of the spectrum of prod-

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12. *United States v. E.I. duPont & Co.*, 351 U.S. 377 (1956).

13. *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966).

14. *United States v. Alcoa (Rome)*, 377 U.S. 271 (1964).

15. *United States v. International Boxing Club of N.Y. Inc.*, 358 U.S. 242 (1959).

In relying upon *United States v. Continental Can*, 378 U.S. 441 (1964), as an example of the impropriety of treating competing products as separate markets, the district court appears to have misinterpreted that case. The court in *Continental Can* held that for antitrust purposes that "meaningful competition" between glass

ucts which have been held to constitute "markets" for antitrust purposes bears out the Supreme Court's observation in *United States v. Continental Can* that:

> [T]he [legal] guidelines offer no precise formula for judgment, and they necessitate rather than avoid, careful consideration based on the entire record.[16]

As this Court recently indicated, a pronouncement as to market definition is not one of law, but of fact, and as such, a party in a private action may allocate it to the jury.[17] Meticulous "color-matching"[18] of precedent to determine how similar a particular product is to others which have or have not constituted markets in other cases is thus not nearly so important as a detailed examination of the record developed in the trial court.[19]

Note — *(Continued)*

and metal containers implied that a relevant market could be constructed of those two product lines. The Supreme Court carefully elaborated, however, that "Glass and metal containers were recognized to be two separate lines of commerce." *Id.* at 456. Moreover, "that there is a broader market made up of glass metal and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic, or cans and glass together, for 'within this broad market, well defined supermarkets may exist which, in themselves, constitute product markets for antitrust purposes.' " *Id.* at 458.

16. 378 U.S. at 449.

17. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1349 (3d Cir. 1975).

18. *Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.).

19. It is for this reason that the defendants' reliance on *United States v. Amsted Industries, Inc.*, CCH 1974-2 Trade Case ¶75, 208 (N.D. Ill. 1974) and *United States v. Johns-Manville Corp.*, 231 F. Supp. 690 and 259 F. Supp. 440 (E.D. Pa. 1966) (Van Dusen, J.), which refused to find supermarkets composed of particular varieties of pipes, is misplaced. The evidence submitted to the finders of fact in those situations clearly differed from the record in the case before us, which involves a wholly different set of litigants. We also note that *Amsted* was decided after a full trial rather than on a motion for a directed verdict.

2. *The Market as Presented at Trial*

According to the evidence here, culvert pipe is used primarily in large construction projects, such as housing developments and highways, to provide channels for draining surface water. Three types of culvert pipe are manufactured: steel, concrete, and aluminum. There was testimony from a number of witnesses that since all three materials have different physical properties, with rare exceptions specifications for construction projects call for only one type of culvert.[20] As a result, on most occasions — once the engineering specifications for the project have been fixed — the contractor who actually purchases culvert pipe may choose only among different manufacturers of the same material. From the contractor's point of view, there could reasonably be said to exist distinct markets for aluminum, for steel and for concrete pipes. Consequently, if he avoided exceeding the price necessary to induce engineers not to specify aluminum, a monopolist in aluminum culvert might well be able to raise prices without fearing encroachment on his sales from other products.

Nor would a jury have acted unreasonably in finding, on the basis of the record here, that the patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market. For there was testimony that *price was not the crucial variable in the choice* by engineers among the materials used to drain surface water. Roy Elam, a former city engineer who qualified as an expert witness, testified that in his experience "cost is checked out at

20. N.T. 36 (Joseph Bonjourno, president of Columbia); N.T. 1272-73 (Roy Elam, former county engineer); N.T. 1282 (Don Spoltore, contractor). Carlos Chaffin, of Reynolds Aluminum, however, testified that specifications generally called for aluminum and steel as alternatives.

Since we deal here with a directed verdict, of course, we must resolve conflicts in testimony in favor of the plaintiff. In view of this standard we are somewhat puzzled by the district court's assertion that "in many instances" both aluminum and steel pipe were specified. (36a).

the end of the design," and "budget numbers are not influenced much" by the cost differentials between concrete, aluminum and steel.[21] He also indicated that the choice among the materials was made primarily on the basis of their physical properties, rather than price.[22]

Credible testimony was produced to show that there is *considerable difference among the physical properties of concrete, aluminum and steel:* Concrete is stronger than steel, which in turn is stronger than aluminum. Concrete culverts, being smooth, conduct water better than steel or aluminum culverts, which are made out of corrugated metal. But steel and aluminum are easier to work with.[23] Further, steel generally is stronger than aluminum. Because of this, and because it has been in the market longer, steel is more widely used than aluminum. The State of New Jersey and the Federal government on occasion specify steel, but forbid aluminum.[24] There was also testimony, however, that aluminum resists corrosion better than steel and is more durable, particularly in salt-water regions. As a result, Elam asserted, aluminum is used to the exclusion of steel "along the shore."[25] Aluminum is also lighter than steel, and

21. N.T. 1202.

22. *Id.* N.T. 1216. *See Smith Kline Corp. v. Eli Lilly & Co.*, type script at p. 14, No. 77-1232 (3d Cir. 1978) (Market definition must take into account the fact that physicians, who regulate use of drugs are not cost-conscious. Therefore, despite overlap in capabilities, drug with unique features constitutes separate market). There is also evidence that the New Jersey Highway Department takes the position that physical capabilities of culvert rather than cost should be the deciding factor. N.T. 1216.

23. N.T. 1159, 1185; 1212-1220 (Elam).

24. N.T. 676 (Bonjourno).

25. N.T. 1219. *See* N.T. 676 (Bonjourno: customer "would only accept aluminum" in salt water environment); N.T. 886 (Buchy, of KACSI: better acceptance around salt water environment); N.T. 1549 (Arvay, manufacturer: aluminum's longer life in salt-water environment makes it desirable).

thus is preferred in marshy areas, where access for heavy equipment would be difficult.[26]

In sum, Elam stated that, as to engineering properties, there was "no way you could say these three [types of culvert] are interchangeable,"[27] and that the materials "were not in competition from an engineering standpoint."[28]

Thus, *there is evidence from which the jury could reasonably have concluded, as did Mr. Elam, that aluminum is recognized by customers as a "specialty material used only in special applications."*[29] Aluminum culvert could therefore have been found by the jury to constitute a separate submarket.[30]

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26. N.T. 1220 (Elam). *See* N.T. 676, (Bonjourno).

27. N.T. 1158-59.

28. N.T. 1267-69. Chaffin, of Reynolds stated that the products were "not completely interchangeable," though they were "interchangeable." N.T. 2101. *Cf.* N.T. 1385 (Schamberg, salesman: "no competition because engineers feel very strongly about their products").

29. N.T. 1221, 1226. *See* N.T. 1549 (Arvay, aluminum manufacturer: "aluminum is a very specialized product").

30. Evidence on most other indicia of submarket existence *was equivocal*, but *could reasonably be understood to support plaintiff's position*.

No figures were presented on cross-elasticity of demand. On one hand Collins testified that "it is possible" that Bonjourno had said that he lost business as a result of lower concrete prices. N.T. 1653. And the statement that price levels of sheet aluminum and sheet steel were related (Chaffin N.T. 2114) could be taken to imply that consumers switched back and forth in response to price between the two varieties of culvert, allowing manufacturers to purchase whichever sheet was cheaper. On the other hand, Elam testified that despite the great increase in concrete and steel prices, he gave no consideration to substituting aluminum for concrete. N.T. 1212. And the rough studies introduced at trial showed little sensitivity of aluminum culvert prices to price changes of other culvert types.

The defendants point to testimony by producers of aluminum culvert pipe, including the plaintiff's president, which makes reference to "competition" between aluminum and steel manufacturers in attempting to have their respective products specified by engineers, as well as statements by KACSI and Reynolds employees that prices of aluminum culvert are set with reference to steel.[31]

Although such testimony is surely not irrelevant to the definition of a market, neither is it determinative in the context of this case. First, it is not the perceptions of manufacturers but those of consumers which are most salient in the determination of market boundaries.[32] More important, the existence of competition between two product lines does not alone preclude market power within each line, if each product has a cadre of customers in which it enjoys a decisive advantage. For example, in *United States v. Grinnell*,[33] the Supreme Court ac-

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Note — *(Continued)*

It is true there was testimony that the same production facilities can be used to turn out both steel and aluminum culvert, and that the same companies often manufacture both. This, however, is not enough to preclude the existence of submarkets as a matter of law. *Compare Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962) (mens, womens, childrens shoes are separate submarkets) with *Id.*, 367 (Harlan, J. dissenting) (plants may be shifted between production of the three types of shoes).

31. *E.g.* N.T. 192, 189, 616, 571-72 (Bonjourno); N.T. 2336, 2338-39 (Collins, KACSI); N.T. 1977 (Melrose, Reynolds employee). *But see* N.T. 564-66 (Bonjourno: did not compete often with steel).

32. *See* e.g. *Smith Kline Corp. v. Eli Lilly & Co.*, CCH Trade Cas. 1976-2 ¶ 61, 199 at p. 70,460 (E.D. Pa. 1976) (Higginbotham, J.) affirmed No. 77-1232 (3d Cir. 1978); *Beatrice Foods, Inc. v. FTC*, 540 F.2d 203 (1st Cir. 1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 551 (1st Cir. 1974) *cert. denied* 421 U.S. 1004 (1975).

33. 384 U.S. 563 (1966).

knowledged competition between the defendants' "central station alarm" system and other protective devices. Indeed said the Court:

> We recognize that (as the district court found) [the defendants] do not have unfettered power to control the price of their services . . . due to the fringe competition of other alarm or watchman services.[34]

Nonetheless, the Court held that the central station services constituted a separate market, since "some customers will . . . be unwilling to consider anything but central station protection."[35] From the evidence presented, it would not have been unreasonable for the jury here to have made a similar finding. Accordingly, we must reject the trial judge's conclusion that the evidence "establishes that aluminum culvert pipe is not a separate submarket from steel culvert pipe."[36] Inasmuch as there was sufficient evidence to go to the jury on this central question, we treat the market, at least for purposes of this appeal, as composed of aluminum culvert pipe.

D. *Monopolization*

The directed verdict against the plaintiffs on the claims that the defendants monopolized, attempted to monopolize, and conspired to monopolize in violation of

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34. *Id.* at 574.

35. *Id.* Also instructive is *United States v. Alcoa* (Rome) 377 U.S. 271, 275 (1964), where the Supreme Court said:

> Admittedly there is competition between insulated aluminum conductor and its copper counterpart, as the district court found. Thus, in 1959, insulated copper conductor composed 22.8% of the gross additions to insulated overhead distribution lies. . . . Yet, we conclude that the degree of competitiveness does not preclude the division [of aluminum from copper] for purposes of §7 into separate submarkets.

36. District court's opinion p. 6.

§2 was based on the trial judge's prior conclusion that steel and aluminum, rather than aluminum culvert pipe alone, constituted the relevant market. Based on the small percentage of the steel and aluminum market which the defendants represented, the trial judge held that there was insufficient evidence to allow a jury to find monopolization, the probability of success necessary for attempted monopolization,[37] or the specific intent prerequisite to liability on a conspiracy to monopolize.

Since we hold that a conclusion that aluminum culvert pipe constituted a relevant market was not unreasonable, the foundation of the directed verdicts on the §2 counts collapses.

There was sufficient evidence from which the jury could have inferred that KACSI attempted to drive Columbia out of business. Holmes Collins, the manager of KACSI's highway division, was heard to say that if Columbia bought metal from Reynolds he, Collins, would locate an aluminum culvert plant in Columbia's "backyard."[38] This was relevant because transportation

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37. In *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1330, 1348 n. 17 (3d Cir. 1975), we declined to follow the Ninth Circuit's rule that it is possible to find an "attempt to monopolize" a "part of commerce" in violation of §2 without first determining the share of the relevant market controlled by the defendant. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir. 1964); *Greyhound Computer Corp. v. International Business Machines*, 559 F.2d 488, 504 (9th Cir. 1977) (and cases cited therein). Instead, "at least in a case such as this," we utilized the criterion of *Swift & Co. v. United*, 196 U.S. 375 (1905), which required sufficient market power to come dangerously close to success. *Coleman Motor Co. supra*, at 1348. *See Rea v. Ford Motor Co.*, 497 F.2d 577, 590 n. 28 (3d Cir. 1975); *but cf. United States v. E. I. DuPont & Co.*, 351 U.S. 377, 395 n. 23 (1956) (distinguishing market inquiry relevant to monopolization from that relevant to attempts or conspiracies to monopolize; commenting that where allegations of conspiracy and combination to monopolize are present, "the scope of the market was not in issue").

38. N.T. 858.

of culvert is a significant item of expense for the product in question, and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery.[39] In fact, Collins did so locate a plant, despite the fact that there was evidence that his original plans called for a Virginia situs.[40]

Moreover, the jury could have found that Collins extended credit to Kennedy, a competitor of Columbia, against the recommendations of the KACSI credit department,[41] thus showing that KACSI engaged in conduct against its business interest in order to damage the plaintiff.

More generally, there was evidence that KACC transferred sheet and coil to KACSI at accounting prices that were less than production cost and well below market price, enabling KACSI to sell pipe more cheaply than independent fabricators could manage.[42] While this may not be a classic predatory pricing endeavor, it effectively allowed KACSI to drive independents out of the market. Finally, the prices at which the Delaware KACSI plant

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39. N.T. 1299, 1316 (Spoltore, contractor).

40. N.T. 2002, 2012. *Compare Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948), where the Supreme Court upheld an inference of unlawful purpose violative of §§1 and 2 from the finding that "Schine made threats to build theaters or to open closed ones in order to force sales of theatres in various towns or to prevent entry by an independent operator."

41. Exhibit P-75 (reproduced at 439a-441a) (memo from credit department finding "no basis for taking on" the credit exposure necessary to allow Kennedy to operate, noting necessity to provide "long term financial assistance"); Exhibit P-24 (reproduced at 438a) (unsigned Kaiser memo noting that for Kennedy to succeed, Kaiser must "maintain his profit margin" in the face of increased competition). *See* Exhibit P-5, (letter from Collins to Kennedy stating Collins' intention to "make Kennedy a success").

42. N.T. 2407-9, 2450-52, 2433-35, 2448-49 (C. E. Parker, KACC official, stating that "transfer prices" were lowered to below manufacturing cost, even excluding depreciation; KACSI profit was calculated using "transfer prices" as cost of materials).

sold culvert were lower than those KACSI charged at certain other plants, despite the fact that costs in Delaware were no lower — giving rise to a permissible inference that prices were depressed in an effort to harm Columbia.[43]

From the testimony and from KACSI's actions against its business interests, the jury could have inferred that KACSI intended specifically to punish Columbia for buying from Reynolds. And given the formerly close relations between KACSI and Columbia, the jury might well have inferred that KACSI knew of the drastic impact its maneuvers would have on Columbia's prospects for survival. Such activities, engaged in by an entity controlling more than 80% of the market, would be sufficient to allow the jury to find both the anticompetitive effects and intent requisite to liability for monopolization or attempted monopolization.

Accordingly we reverse the directed verdict as to defendants KACSI and KACC on the §2 counts.[44]

E. Conspiracy in Restraint of Trade

By its terms, §1 of the Sherman Act proscribes "every combination . . . or conspiracy in restraint of trade."

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43. N.T. 2336-2339.

The testimony of Mr. Arvay, an independent aluminum culvert fabricator operating in the southern part of the United States, is also supportive of the plaintiff's theory. Arvay stated that after he "refused point blank" to purchase his raw materials exclusively from Kaiser, Kaiser began to compete in his area, where they had not previously been active. N.T. 1533. His perception of the competition matched the "price squeeze" alleged by the plaintiff here: Kaiser marketed finished pipe a fraction of a cent above the price Arvay paid for raw materials. N.T. 1533-41.

44. The trial judge held in the alternative that insufficient evidence had been adduced to support a jury finding of conspiracy. Since we hold *infra* that such a conclusion is accurate as to Kennedy and Kennedy Culvert, we affirm the verdict as to those defendants.

Liability under that section obviously requires a finding of a combination or conspiracy. In addition, under well-worn judicial interpretation, a finding of a §1 violation entails a determination that such conspiracy or combination *unreasonably* restrains trade.[45] The trial judge here supported his decision to grant a directed verdict on the §1 charge both on the ground that there was insufficient evidence from which a jury could have found a combination or conspiracy, and on the basis that the evidence could not as a matter of law support a finding that whatever conspiracy allegedly existed unreasonably restrained trade.

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45. The doctrinal template which continues to mold the rule of decision for modern cases is the articulation of Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Quoted in, e.g. Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n. 15 (1977); *Glauser Dodge Co. v. Chrysler Corp.*, (No. 76-2390, 77-1188, 3d Cir. 1977) slip op. at 18; *American Motor Inns Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1246 (3d Cir. 1975).

As a further refinement, in certain classes of cases, "agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958) *quoted GTE Sylvania supra* 433 U.S. at 50.

The second rationale is untenable in light of our conclusion that the jury could have found that aluminum culvert is a relevant market. If the jury ascertained that KACSI, which controlled 80% of the aluminum culvert market, conspired to drive one of its few competitors (Columbia) out of business, such a conspiracy could have been found by the jury to violate §1. Since, as we have noted previously,[46] the presence of independent producers in an oligopolistic market serves to limit the market power of the dominant firms, the departure of an independent producer in such a situation adversely affects competition. Where such an elimination is consciously brought about by concerted action to which a dominant entity is a party, at least in the absence of a compelling business justification for such actions, an unreasonable restraint of trade may be found to exist.[47]

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46. *Glauser Dodge Co. v. Chrysler Corp.*, (No. 76-2390, 77-1188, 3d Cir. 1977) slip op. at 20, *cert. denied* May 22, 1978; *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975); *see* N.T. 1848-1853 (Prof. Williamson, an economist, testifying as an expert witness, elaborated the adverse effects on competition resulting from driving independents out of business through use of a price squeeze).

47. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975); *American Motor Inns v. Holiday Inns*, 521 F.2d 1230, 1248 (3d Cir. 1975); *Fount Wip v. Reddi Wip, Inc.* 568 F.2d 1296 (9th Cir. 1978); *Taxi Weekly v. Metropolitan Taxicab Board of Trade*, 539 F.2d 907 (2d Cir. 1976).

Since there is sufficient evidence here for a jury to find that KACSI controls 80% of the relevant market, we need not decide the question of whether a conspiracy to eliminate a competitor would be a violation of § 1 in the absence of such a market position on the part of one of the conspirators. We note, however, that we have previously stated: "A contract, regardless of actual effect, contravenes the Act if it was intended as part of a scheme to . . . drive a competitor out of the market." *American Motors Inns, Inc. v. Holiday Inns*, 521 F.2d 1230, 1248 (3d Cir. 1975). *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975) ("a combination of distributors which through unfair practices eliminates a competitor and leaves it in such a condition that it lacks the ability to continue business . . . has an adverse effect on the market place");

Thus the issue as to the §1 violation is whether the trial judge's alternative ground for decision is viable: that there was inadequate evidence to allow the jury to find a conspiracy involving KACSI to put Columbia out of business.

As observed above, there was evidence which could have permitted a jury to infer that KACSI acted with an intent to drive its competitor, Columbia, out of business. The propriety of the directed verdict thus turns on whether, with regard to KACSI and any other defendant,

> . . . the circumstances are such as to warrant [the trier of fact] in finding that the [alleged] conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement.[48]

Consequently, we now turn to examine separately the

Oreck v. Whirlpool, 563 F.2d 54, 58 (2d Cir. 1977) (plaintiff required to show either anticompetitive effect on industry as a whole, or that restriction was designed to drive it out of business) (dictum); *Fount Wip, supra*, (holding that attempt to drive firm out of business violates § 1, even where market is not sufficiently defined to allow finding of § 2 violation).

The position is not without support in Supreme Court decisions. *E.g. United States v. General Motors*, 384 U.S. 127, 146 (1966) ("exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins"); *Poller v. Columbia Broadcasting Syst.*, 368 U.S. 464, 468-73 (1962) (attempt to drive independent station out of business by television network makes out § 1 violation even though network's position in market served by television station was limited); *see, e.g. Ramsey v. UMW*, 401 U.S. 302, 304-05 (1971) (alleged conspiracy to drive small coal operators out of business); *First National v. Cities Services*, 391 U.S. 253, 284-86 (1968) (alleged conspiracy to drive independent oil producer out of business)

48. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975) *quoting American Motor Inns Inc. v. Holiday Inns Inc.*, 521 F.2d 1230, 1243, *quoting American Tobacco Co. v. United States*, 781, 810 (1946).

two groupings which, according to Columbia, harbor such common unlawful purposes.

1. *The Alleged KACSI/KACC Conspiracy*

The first combination alleged to violate § 1 arises out of the joint activities of KACC and KACSI. KACSI is a wholly-owned subsidiary of KACC, sharing joint management on several levels of operation. Because of this, KACSI and KACC suggest that they are incapable of conspiring together. Though legally distinct for most purposes, defendants argue, the reality of the corporate structure of KACC and KACSI negatives the plurality of actors legally necessary to form an illegal conspiracy.

This argument is not well-founded in law, for the prerequisites of a conspiracy under § 1 are fulfilled by the presence of two or more legally distinct corporations. Indeed, we recently had occasion to reject a contention of legal inability to conspire with regard to subsidiaries which were "part of an integrated Chrysler enterprise engaged in the manufacturing and marketing of automobiles." The claim that such corporation could not form a § 1 conspiracy, we held, was foreclosed by a line of cases in this Court reaffirming the viability of the "intra-enterprise conspiracy" theory as applied to separately incorporated entities.[49]

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49. *Glauser Dodge v. Chrysler Corp.*, No. 76-2390, 77-1188 (3d Cir. 1977) slip op. p. 16, *cert. denied* May 22, 1978. *See Cromar Co. v. Nuclear Materials Equip. Corp.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *Brayman v. Bassett Furniture Co.*, 552 F.2d 90, 101 n. 32 (3d Cir. 1977).

The defendants rely on *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972), for the proposition that a parent and subsidiary which are "in reality" the same corporation, cannot conspire. However, in *Cromar*, n. 18, we characterized the language upon which the defendants now rely as dictum.

Next, the defendants point to *Sunkist Growers Inc. v. Winckler & Smith Citrus Products*, 370 U.S. 19 (1962). But that case also offers scant support for an attack on the intra-enterprise conspiracy

Judge Cahn's holding that there was insufficient evidence to go to the jury on the existence of a KACC/KACSI conspiracy was grounded on a different rationale. The trial judge pursued the opposite approach from the defendants' argument of "functional identity;" while he commented that he harbored doubts as to the

doctrine. *Sunkist* held only that the policy behind the Capper-Volstead Act required that two affiliated subsidiaries of a fruit marketing organization be treated as exempt agricultural organizations. Indeed, in *Case Swayne Co. v. Sunkist Growers*, 389 U.S. 384, (1967) the Court held that successors to the subsidiaries exonerated in *Sunkist I* were not exempt when their activities included processing by middle-men.

Rather, the Supreme Court has made clear that the choice to adopt dual corporate form subjects businesses to the strictures of the antitrust laws. *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Schine Chain Theaters Inc. v. United States*, 334 U.S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 2[illegible] (1947). The attempt of the student author of Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman act: A Suggested Standard* 75U. Mich. L. Rev. 717, [illegible] the Supreme Court cases as applying only to distinct economic entities is unconvincing, particularly in view of its failure to deal with *Schine Chain*.

If limitations on the intra-enterprise corporate conspiracy doctrine are necessary, it seems to us that a more appropriate standard and one more consistent with the cases is that articulated by Professor Sullivan:

> "Concerted action" by two "legal persons" which is limited solely to the internal management of a single fim does not restrain competition; but "concerted action" by two "legal persons" which erects barriers to entry by another separate firm . . . can be a restraint of trade. . . . [But] at some point, a diminished level of business integration between two related corporations will warrant a conclusion that they are two firms even though there are some elements of common ownership and control.

Sullivan, Law of Antitrust, 328 (1977).

See Report of Attorney General's National Committee to Study the Antitrust Laws 34 (1955) (no violation occurs if the "conspiracy" restrains no trade other than that of the parent and its subsidiaries").

capacity of KACSI and KACC to conspire, Judget Cahn held that rather than being too closely aligned to constitute a conspiracy, KACSI and KACC were not closely enough related. He determined that threre was inadequate evidence to allow a jury to find that the two entities shared the requisite unity of purpose. We disagree with this evaluation.

Some of the efforts which allegedly engineered Columbia's elimination were concededly undertaken by KACSI alone. However, the jury could have found that the combined efforts of KACC and KACSI were utilized (1) to impose the price squeeze and (2) to open the New Castle plant.

In finding that prices for sheet and pipe were arrived at by Holmes Collins, KACSI's division manager, independently of KACC, and thus that KACC was not implicated by the price squeeze, Judge Cahn relied on the testimony of Collins as evoked by the defendants on cross-examination. Were this a finding of fact, and a judgment of credibility, such reliance could not be reversed. However, the defendants' motion was one for directed verdict, and Collins' testimony had been contradicted.

Collins himself stated elsewhere in his testimony that he had no part in setting the "specification price" of coil.[50] This casts doubt on his later assertion that the responsibility for setting all prices was solely his. Moreover, in a memorandum to his subordinates, which was admitted into evidence, Collins noted that he "had been chastised for not getting our prices up high enough."[51] Since there was testimony that Collins, as manager of

50. N.T. 2332. Depending on market conditions, KACSI sold metal at either a "specification price" or a lower "commodity price" to some users. The withdrawal of the lower "commodity price" to culvert manufacturers is alleged to have been a factor in Columbia's demise.

51. Exhibit P- 950.

the Highway Products Division of KACSI, reported to the Sheet and Plate Division of KACC,[52] the jury could have inferred that the pricing policies of KACSI were not independent as Collins claimed at trial, but rather arrived at jointly with KACC. Likewise, another KACSI employee, David Thomas, stated that "someone higher up than Mr. Collins" was responsible for a crucial price increase.[53] Again, the jury could reasonably have concluded from such testimony that pricing responsibility was shared with KACC.

Finally, and quite significantly, the keystone of the alleged price squeeze was the price at which KACC transferred coil and sheet to KACSI. So long as the transfer occurred at a price below cost, the predatory effect could be obained if KACSI kept a sufficient and constant profit margin. Since KACC set the transfer price at a low level, apparently against its business interests, the jury could reasonably have found participation by KACC in the price squeeze.[54]

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52. N.T. 2409.

53. N.T. 1456-59

54. Compare *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977):

> The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express can be inferred, but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational independent choice less attractive than that of concerted action . . . . We recently articulated those circumstances in *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 [1314] (3d Cir. 1975):
>
> > (1) a showing of acts by the defendants in contradiction of their own economic interests . . . and
> >
> > (2) satisfactory demonstration of a motivation to enter an agreement.

See First Nat. Bank v. Cities Services, 391 U.S. 153, 184-88 (1968) (intent may be inferred from concerted action where interests of victim and predators conflict, and concerted action would work to the benefit of predators).

In regard to the placement of the New Castle plant, it appears that KACC's approval of Collins "Request for Investment" was a precondition to his constructing the plant. From this involvement, along with the pricing policy, the close relationship between the companies, and the incentive for both KACC and KACSI to keep control of the market, it would not have been unreasonable for the jury to infer a conspiracy between KACC and KACSI to drive Columbia out of business.

2. *Alleged Kennedy/KACSI Conspiracy*

In contrast to the broad-ranging activities of KACC and KACSI, Kennedy's role in the scenario of Columbia's demise was a limited one. Kennedy left Columbia and opened his own business in competition with his former employer.[55] On its face, such conduct seems pro-

55. The plaintiff refers to three other types of evidence to support their claim of a Kennedy-Kaiser conspiracy. First, Columbia has adduced testimony which could be understood to indicate that (a) Kennedy used confidential information he had obtained as a Columbia employee in formulating his own bid in Camden County; and (b) Kennedy solicited one Villari as a customer for Kaiser while still employed by Columbia. While such actions, if established might constitute actionable torts and would probably breach a duty of loyalty, their effect on Columbia's economic viability was neither shown to be substantial nor long-lasting. And the fact that Kennedy breached a duty of loyalty on two occasions does little to prove that he shared in Kaiser's anti-competitive design.

Second, Columbia points to what it refers to as the "clandestine meetings" between Kennedy and KACSI regarding the establishment of Kennedy's business while Kennedy was in Columbia's service. In view of the fact that Kennedy had not agreed to a covenant not to compete with Columbia, such meetings establish only that Kennedy "conspired" with KACSI to start his own business — hardly an anti-competitive act — not that he shared KACSI's anti-competitive purpose.

Finally, Columbia notes the fact that KACSI and Kennedy Culvert representatives were heard to comment at a bid that they had "gotten their wires crossed." Even if the comment was not, as KACSI claims, a jest, such hearsay repetition of an isolated remark without more is too weak a foundation upon which to build a structure of antitrust liability.

competitive, although perhaps demonstrating less than punctilious faithfulness to Columbia, for it created a new competitive entity. And Bonjourno, president of Columbia, testified that two months before Kennedy left, Bonjourno, in the course of a dispute over Kennedy's salary, told Kennedy that Kennedy could "look around" in Southern New Jersey to see whether he could improve his remuneration.[56] Moreover, Bonjourno reiterated that there were no contractual impediments to Kennedy's leaving Columbia for other employment.[57]

Certainly Kennedy's actions could not be characterized as being against his economic interest. In the four years he was employed by Columbia, Kennedy's sales of pipe rose to $300,000 per year, making Kennedy Columbia's best salesman.[58] Nonetheless, Kennedy's salary increased only from $200 to $325 per week.[59] Nor is there any testimony that Kennedy was attempting to destroy Columbia. A finding that Kennedy consciously shared KACSI's anti-competitive purposes would thus be mere conjecture.

Likewise, the relationship between Kennedy and KACSI was not such as to give rise to a reasonable inference that Kennedy was aware of KACSI's strategy and knowingly associated himself with it. While it is true, as plaintiff maintains, that certain testimony can be taken to imply that KACSI gave Kennedy favored treatment, the record is devoid of evidence that Kennedy was privy to KACSI's broader machinations. And a jury could not have reasonably found that Kennedy knew that the probable effect of KACSI's actions would be to eliminate Columbia. The record is barren of testimony that Kennedy was aware either of Coumbia's production costs, or

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56. N.T. 374-75.

57. N.T. 375-78.

58. N.T. 346.

59. *Id.* there is also testimony that Kennedy was subjected to increased financial pressures between 1968 and 1972 due to the birth of his seventh, eighth, ninth and tenth children. N.T. 343-44, 347-78.

of the price at which it bought metal. Absent this information, Kennedy could not know that the competitive pressure his entrance into the market evoked would prove fatal to Columbia.[60]

Inasmuch as we agree with the district court that there was insufficient evidence from which the jury could find a "unity of purpose, design or understanding," between Kennedy and the other defendants, we sustain the directed verdict as to Kennedy.

E. Clayton Act

The final count of Columbia's complaint charges KACSI with a violation of §3 of the Clayton Act, 15 U.S.C. §14, which makes it unlawful for:

> . . . any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Columbia contends that KACSI imposed upon it an exclusive dealing arrangement which precluded it from purchasing aluminum sheet and coil from other manufacturers so long as it bought KACSI materials. Such arrangement, Columbia maintains, substantially lessened competition in the aluminum coil and sheet market. This was true, Columbia alleges, because its purchases, which were foreclosed to other sellers, represented at

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60. *Cf. Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) (holding agent potentially liable where he knew of the "obvious purpose and necessary effect" to eliminate independent stations and "had a personal stake in the outcome").

least 8% of the aluminum coil and sheet market where KACSI held 50% of the total sales. Such foreclosure, Columbia contends, violates the Clayton Act.[61] The district court, however, entered a directed verdict on this question because of the failure of Columbia adequately to prove that aluminum coil and sheet used in culvert fabrication was a "line of commerce" within the meaning of the Clayton Act.

In determining the share of the market preempted as a result of an exclusive dealing arrangement imposed by a producer, a court must look to the alternative customers available to purchase the output of other producers. Here, no evidence was adduced to show whether the output of the facilities which produced the aluminum sheet and coil for the culvert industry could be or were used to manufacture material sold only to fabricators of aluminum culvert pipe. Since this is so, there was insufficient evidence to demonstrate whether aluminum sold to culvert manufacturers, or some much larger market constituted the relevant line of commerce. Thus, the jury would be left without adequate guidance in attempting to delineate the share of the market foreclosed by the alleged exclusive dealing arrangement, or its probable market impact.

Consequently, we do not disturb the directed verdict on the Clayton Act claim.

F. Conclusion

(1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert.

(2) There was sufficient evidence to go to the jury on the charge that KACSI and KACC violated §2 of the

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61. Columbia's calculation is that since there was testimony that KACSI sold 6 million tons of sheet and coil to culvert manufacturers, and that KACSI held at least 50% of the market, Columbia's purchases of one million tons represented at least 8% of the market.

Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market.

(3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of §1 of the Sherman Act.

(4) There was insufficient evidence to allow the jury reasonably to conclude that Robert Kennedy and Kennedy Culvert conspired with KACSI either in violation of §1 or §2 of the Sherman Act.

(5) There was insufficient evidence to allow the jury reasonably to define the "line of commerce" restrained by any exclusive dealing arrangement, and, thus, there was insufficient evidence to go to the jury on the claimed violation of §3 of the Clayton Act.

The judgment of the district court will therefore be affirmed as to the defendants Kennedy Culvert and Robert Kennedy. As to KACC and KACSI, the judgment will be affirmed insofar as it granted a direct verdict against the plaintiffs on the Clayton Act claims; the remainder of the judgment will be reversed and the case remanded for action consistent with this opinion.

TO THE CLERK:

Kindly file the foregoing opinion.

Circuit Judge

DATED:

No. 77-1846

United States Court of Appeals
for the Third Circuit

COLUMBIA METAL CULVERT COMPANY, INC.,
Appellant

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY AND KENNEDY CULVERT
& SUPPLY COMPANY
AND
ROBERT KENNEDY

(D. C. Civil No. 74-122)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and HIGGINBOTHAM, *Circuit Judges* and MARKEY*, *Chief Judge of the Court of Customs and Pateni Appeals*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on February 22, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 2, 1977, be, and the same is hereby affirmed as to the defendants Kennedy Culvert and Robert Kennedy. As to KACC and KACSI, the said

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*Sitting by designation.

judgment of the said District Court be and the same is hereby affirmed insofar as it granted a directed verdict against plaintiffs on the Clayton Act claims; the remainder of the said judgment of the said District Court be, and the same is hereby reversed, and the cause remanded for action consistent with the opinion of this Court.

ATTEST:

May 24, 1978 Clerk